

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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HOFFSCHLAEGER COMPANY, LIMITED,  
Plaintiff in Error,  
vs.

MARGARET FRAGA, by ALFRED FRAGA, Her  
Guardian ad Litem,  
Defendant in Error.

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Transcript of Record.

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Upon Writ of Error to the Supreme Court of the  
Territory of Hawaii.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the Supreme Court of the Territory of Hawaii.

No. 1360.

ON ERROR SUED OUT BY DEFENDANT.

MARGARET FRAGA, by ALFRED FRAGA,  
Her Guardian ad Litem,

Plaintiff-Defendant in Error,

vs.

HOFFSCHLAEGER COMPANY, LIMITED,  
Defendant-Plaintiff in Error.

**Application for Writ of Error**

To the Clerk of the Supreme Court of the Territory  
of Hawaii:

Please issue a writ of error in the above-entitled  
cause to the Clerk of the Circuit Court of the  
Fourth Judicial Circuit, Territory of Hawaii, on  
behalf of the defendant, Hoffschlaeger Company,  
Limited, as plaintiff in error herein, returnable to  
the Supreme Court.

Dated: Honolulu, T. H. November 23d, 1921.

HOFFSCHLAEGER COMPANY, LIMITED.

By Its Attorneys,

SMITH, WARREN & STANLEY.

[Endorsed]: #1360. In the Supreme Court of  
the Territory of Hawaii. Margaret Fraga, by Al-  
fred Fraga, Her Guardian ad Litem, Plaintiff-  
Defendant in Error, vs. Hoffschlaeger Company,  
Limited, Defendant-Plaintiff in Error. Appli-  
cation for Writ of Error. Received and filed in the  
Supreme Court November 23, 1921, at 3:13 o'clock  
P. M. J. A. Thompson, Clerk. Smith, Warren &



Stanley, Attorneys at Law, Bank of Hawaii Bldg.,  
Honolulu, T. H. [1\*]

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In the Supreme Court of the Territory of Hawaii.  
No. 1360.

ON ERROR SUED OUT BY THE DEFEND-  
ANT.

MARGARET FRAGA, by ALFRED FRAGA,  
Her Guardian ad Litem,  
Plaintiff-Defendant in Error,  
vs.

HOFFSCHLAEGER COMPANY, LIMITED,  
Defendant-Plaintiff in Error.

**Assignment of Errors.**

Now comes Hoffschlaeger Company, Limited, the defendant in that certain suit above-entitled where-in Margaret Fraga, by Alfred Fraga, her guardian *ad litem*, is plaintiff and said Hoffschlaeger Company, Ltd., is defendant, heretofore brought and pending in the Circuit Court of the Fourth Judicial Circuit, at Law, and, as plaintiff in error herein, now say that in the record, rulings, orders and proceedings had in said cause before the Circuit Court of the Fourth Judicial Circuit, there are manifest and material errors; and the defendant as plaintiff in error having made application herein for a writ of error for the correction of said errors,

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\*Page-number appearing at foot of page of original certified Transcript of Record.



now assigns and specifies the following errors upon which it relies, to wit:

ASSIGNMENT OF ERROR No. 1.

That the Trial Court erred in overruling the suggestion of the disqualification of the Honorable J.W. Thompson, Judge of the Circuit Court of the Third Judicial Circuit of this Territory to preside at the trial of the cause, said suggestion of disqualification being duly filed by the defendant—plaintiff in error—on May 23, 1921, and prior to the impanelling of a jury [2] in the said cause, to which ruling the defendant—plaintiff in error—duly excepted, which exception was duly allowed and which ruling is hereby assigned as error.

ASSIGNMENT OF ERROR No. 2.

That the Trial Court erred in denying the motion of defendant—plaintiff in error—for the withdrawal of a juror and the entry of a mistrial in said cause, to which ruling the defendant—plaintiff in error—duly excepted, which exception was duly allowed and which ruling is hereby assigned as error.

ASSIGNMENT OF ERROR No. 3.

That during the cross-examination of one V. E. M. Osorio, a medical witness called for the plaintiff—defendant in error—and after said witness had testified during the course of his direct examination that the plaintiff—defendant in error—was suffering from an injury to her left leg below the knee known as a partial separation of the tubercle of the ephiphysis of the tibia from the shaft of the tibia, and that such condition might

continue until the plaintiff—defendant in error—was between the ages of twenty and twenty-five years, and that he could not state anything certain about a complete cure at that time (Trans. of Ev., pp. 53-58), the following proceedings were had and testimony given:

“Q. And it was an injury such as you claim the plates in this case of the girl’s left knee show that you were speaking of yesterday, when you said that such an injury heals from three to five weeks?

“A. We expect it to heal.

“Q. And it is agreed among medical men that it usually heals about that time?

“A. It does not. Medical men do not claim that. We expect it to heal in three to five weeks, if it does heal. [3]

“Q. What do you mean, Doctor, by the expression you expect it to heal?

“A. Well, we expect it to because we figure it to be about the same formation as bone; bone takes three to five weeks to heal, we give it the same time to heal.

“Q. Have you any authority for that statement?

“A. Sajous; Cunningham; Rose and Carton and DeCosta.

“Q. Have you any of those authorities here?

“A. I have Sajous; De Costa, Cunningham, Rose and Carton.

“Q. Will you produce those, Doctor?

“A. I will have to go home and get them.

“Judge STANLEY.—I ask that witness be instructed to go home and get them, your Honor.

“Judge THOMPSON.—I will take that under advisement; that is intended as a motion: ‘that witness be instructed to produce them.’

“Judge STANLEY.—I now make a motion, if the Court please that the witness be instructed to produce in court the books of the authors whom he has mentioned so that counsel may have an opportunity of cross-examining the witness on the subject in question.

“Judge THOMPSON.—The Court denies the motion.”

To which ruling defendant—plaintiff in error—noted an exception, which exception was duly allowed and which ruling is hereby assigned as error. (Trans. of Ev., 85–86.)

#### ASSIGNMENT OF ERROR No. 4.

That thereafter during the cross-examination of the said witness, the following proceedings were had and testimony given:

“Q. (Judge THOMPSON to witness.) Are those books counsel called for at his disposal?

“A. I can bring them, I have some at the house and some at the office, if at any time he wants to see them.

“Judge STANLEY.—Do I understand that your Honor refuses me permission to have those books produced by the witness, while the witness is on the stand? [4]

“Judge THOMPSON.—I have overruled the motion.

“Judge STANLEY.—I make this motion if the Court please: I renew my motion, stating as a grounds therefore, that I wish at this time, while the witness is on the stand to have him read the extracts from those books or refer to the extracts from those books, which cite as authorities for his statements that the injury known as a separation of the epiphysis of the tubercle does not usually heal until the tubercle becomes bone and is united to the shaft of the leg or tibia until from the twentieth to the twenty-fifth year.

“Judge THOMPSON.—The Court overrules the motion without comment.

To which ruling defendant—plaintiff in error—noted an exception, which exception was duly allowed and which ruling is hereby assigned as error. (Trans. of Ev., p. 86.)

#### ASSIGNMENT OF ERROR No. 5.

That thereafter during the cross-examination of the said witness, he having previously testified (Trans. of Ev., p. 100) that, the injury not having completely healed within three weeks, the plaintiff—defendant in error—was thereafter allowed to walk, the following proceedings were had and testimony given:

“Q. Is it not a fact, Doctor, that the mere allowing of her to walk around, merely with that adhesive plaster bandage on until the

tubercle had come back to its normal position, would retard the recovery?

"A. Not necessarily.

"Q. Would it ordinarily? A. No.

"Q. Would it under any circumstances?

"A. No.

"Q. Then what do you mean by saying, not necessarily?

"A. For this reason that after separation shows no complete healing at the end of three to four weeks, it is unnecessary to keep the patient in bed for recovery you will not get within that time, it will not surely develop at the end of nine months.

"Q. Doctor, if without keeping the girl in bed you had kept her at home and given the leg as much rest as possible would you not expect the recovery to be quicker than in the case of allowing her to walk around? [5]

"A. I do not.

"Q. Have you any authority, Doctor, to which you can refer, except your own, to the effect that if the injury is not healed within three or four weeks, it is not necessary and will serve no purpose to keep the injured part immobile?

"A. I will mention De Costa.

"Q. Have you De Costa with you?

"A. I have it over at the house.

"Q. And when you refer to De Costa, a surgical work published by De Costa, he is supposed to be a surgeon in Jefferson University?



“A. Yes.

“Q. And if you had De Costa could you refer us to the passage in what work to which you are using in support of your statement?

“A. Yes, sir.

“Q. (Judge STANLEY.) If the Court please I now renew my motion that the witness do procure the book to which he has referred, that I may be able—

“Judge THOMPSON.—The Court overrules the motion, for the reason that the Court allowed this witness to be questioned and even cross-questioned on his ability as a surgeon, in attempting to disqualify or qualify his statements.”

To which ruling defendant—plaintiff in error—noted an exception, which exception was duly allowed and which ruling is hereby assigned as error. (Trans. of Ev., pp. 100–102.)

#### ASSIGNMENT OF ERROR No. 6.

That thereafter during the cross-examination of the said witness, he having previously testified that the chief muscle used in extending the leg is attached to the portion of the leg which in the case of the plaintiff—defendant in error—was alleged to have been injured (Trans. of Ev., pp. 102–103) the following proceedings were had:

“Q. You don’t mean to say, Doctor, that she would get well quicker by being allowed to walk and moving, and having some of the force felt on that muscle, than she would if she had not been allowed to walk?

“Judge THOMPSON.—That has been answered three or four times.” [6]

To which ruling defendant—plaintiff in error—noted an exception, which exception was duly allowed and which ruling is hereby assigned as error. (Trans. of Ev., p. 104.)

ASSIGNMENT OF ERROR No. 7.

That thereafter during the cross-examination of the said witness the following proceedings were had and testimony given:

“Q. Now, Doctor, the object a doctor has in view in treating an injury such as you prescribe in the plaintiff’s case is to prevent further separation of the tubercule, is it not?

“A. Yes.

“Q. And to allow the tubercule to get back to its former place?

“A. Yes.

“Q. And is it not a fact, Doctor, that every time that the plaintiff extended her leg the action of the quadriceps tendon tends to enlarge that separation and prevent—

“Mr. RUSSELL.—I object to that question as it has already been answered.

“Judge THOMPSON.—The Court sustains the objection.”

To which ruling defendant—plaintiff in error—noted an exception, which exception was duly allowed and which ruling is hereby assigned as error. (Trans. of Ev., p. 105.)

## ASSIGNMENT OF ERROR No. 8.

That thereafter during the cross-examination of the said witness the following proceedings were had:

“I will ask you, Doctor, is it not a fact that if you want to guard against any further separation and allow the tubercule to resume its normal position and to allow the patient to recover naturally, you must prevent in some way all action of the muscles on the injured part?”

“Judge THOMPSON.—Need not answer that.”

To which ruling defendant—plaintiff in error—noted an exception, which exception was duly allowed and which ruling is hereby assigned as error. (Trans. of Ev., p. 105.) [7]

## ASSIGNMENT OF ERROR No. 9.

That thereafter during the cross-examination of the said witness the following proceedings were had and testimony given:

“Q. I will ask you, Doctor, if it is not recognized by leading medical and surgical authorities that the proper way to keep the leg in such a position that the muscle, quadriceps femoris, will not act on the injured part is to keep the leg by the use of splints or by a plaster of paris cast, or other cast, immobile up to a certain period.

“A. Yes, up to a certain period.

“Q. Up to what period?

“A. Three to four weeks; as high as five weeks.



“Q. Do you mean, Doctor, that irrespective of the condition in which the injury may be at the end of three or four weeks, medical authorities and surgeons, discontinue to use splints or casts.

“A. In what cases may I ask.

“Q. In cases of injuries of the nature you say the plaintiff had?

“A. Up to three or five weeks they do.

“Q. Is it not a fact, Doctor, that the leg should not be taken out of the splints or cast until the bone has healed or is rapidly healing?

“A. No, sir.

“Judge THOMPSON.—In his evidence there was no mention made of splints having been used, and the Court will ask that you direct your examination on different lines.”

“Judge STANLEY.—Is it your Honor’s ruling that I will not be allowed to examine the witness on the proper practice to be followed in attempting to heal an injury of the kind that the doctor said the patient is suffering from. May I ask your Honor to—

“Judge THOMPSON.—Judge Stanley, I am not undertaking your case.

“Q. I will ask you, Doctor, if, considering your testimony that you knew the nature of the injury to the tubercle both before and after the taking of the X-Ray picture of September 4th, the surest and safest method of securing a rapid and complete recovery of the

injured portion would not it be to adopt the use of a splint or cast continually?

“A. Not necessarily. [8]

“Q. Will you explain what you mean, not necessarily?

“A. In this case, as long as we can place the limb in an immobile position by placing obstructions on either side and having the leg properly bandaged tightly by not having a plaster cast or splints.

“Q. Do I understand that if you find at the end of three or four weeks the leg not healed that you can discard this splint or cast?

“Judge THOMPSON.—You need not answer that.”

To which ruling defendant—plaintiff in error—noted an exception, which exception was duly allowed and which ruling is hereby assigned as error. (Trans. of Ev., pp. 105–107.)

#### ASSIGNMENT OF ERROR No. 10.

That thereafter during the cross-examination of the said witness the following proceedings were had:

“Q. Is it your opinion that if you find at the end of three or four weeks the leg does not heal that you can discard the splints or cast?

“Mr. RUSSELL.—I object to the question.

“Judge THOMPSON. — Objection sustained.”

To which ruling defendant—plaintiff in error—noted an exception, which exception was duly

allowed and which ruling is hereby assigned as error. (Trans. of Ev., p. 107.)

#### ASSIGNMENT OF ERROR No. 11.

That thereafter during the cross-examination of the said witness the following proceedings were had:

“Do you mean, Doctor, that if the injury has not healed at the end of three or four weeks it would be useless to continue to keep the leg in splints for any further time?

“Mr. RUSSELL.—We object to the cross-examination; we have purposely avoided objecting in order that it would not seem as if we were trying to keep something away, and I think it should be limited. We object upon the ground that defendant has been permitted considerable latitude in the cross-examination of the witness upon the subject matter embodied in this particular question, and to permit further cross-examination upon this question would be—

“Judge THOMPSON.—Objection sustained.” [9]

To which ruling defendant—plaintiff in error—noted an exception, which exception was duly allowed and which ruling is hereby assigned as error. (Trans. of Ev., p. 107.)

#### ASSIGNMENT OF ERROR No. 12.

That thereafter during the cross-examination of the said witness, he having previously testified as follows:

“Q. Is it not a fact that every time she extended her leg that tendon was pulling on the injured part?

“A. We expected that by due counter-irritation to have a certain amount of bone tissue to heal it. With that protection she had on, it prevented a complete usage of that muscle that controls that ligament.” (Trans. of Ev., p. 103.)

the following proceedings were had:

“Q. You stated, Doctor, I think, that the allowing of the plaintiff to extend the, to walk about and extend her injured limb would not delay recovery because you expected by counter-irritation some bone tissue; please explain what you mean?

“Judge THOMPSON.—You need not answer the question.”

To which ruling defendant—plaintiff in error—noted an exception, which exception was duly allowed and which ruling is hereby assigned as error. (Trans. of Ev., p. 108.)

#### ASSIGNMENT OF ERROR No. 13.

That thereafter during the cross-examination of the said witness the following proceedings were had and testimony given:

“Q. Is it not a fact, Doctor, that an injured leg, has been up to date, and was during the time of your service in the expeditionary forces, kept in a sling or hammock so that the muscles affecting the injured part would not play upon it?

“Judge THOMPSON.—You need not answer that question.

“Q. (By Judge THOMPSON.) Doctor, have you given this girl such treatment as your experience, your ability, and medical science would dictate, under all circumstances?

“A. I have.

“Judge STANLEY.—I note an exception to the question [10] of the Court, on the ground that it does not call for the standard of treatment which the law requires, and that the witness can describe a treatment or give his conclusions.

“Judge THOMPSON.—Proceed.”

To which ruling defendant—plaintiff in error—  
noted an exception, which exception was duly  
allowed and which ruling is hereby assigned as  
error. (Trans. of Ev., p. 114.)

#### ASSIGNMENT OF ERROR No. 14.

That thereafter during the cross-examination of the said witness the following proceedings were had:

“Judge STANLEY.—I now renew my motion, if the Court please, that the Court instruct the witness to produce the authorities which he enumerated as supporting the position taken by him.

“Judge THOMPSON.—The Court overrules the motion.”

To which ruling defendant—plaintiff in error—  
noted an exception, which exception was duly

allowed and which ruling is hereby assigned as error. (Trans. of Ev., p. 115.)

#### ASSIGNMENT OF ERROR No. 15.

That thereafter during the recross-examination of said witness, he having previously on redirect examination mentioned Keene as an authority upon the proposition advanced by the witness that if the healing of such an injury as plaintiff—defendant in error—was alleged to have suffered was not effected from within three to five weeks you cannot expect a recovery until after some years, and having identified the book, present in the courtroom, to which he referred (Trans. of Ev., pp. 118 and 119) the following proceedings were had and testimony given:

“Judge STANLEY.—You have stated, Doctor, that Keene’s works support your statement that if the healing is not effected within three or four weeks, you cannot expect a recovery for some years?

“A. It was another authority I cited. [11]

“Q. You have cited Keene’s work on surgery as being an authority for the proposition that if the healing of an injury such as you say plaintiff suffered on August 20th was not effected within three to four weeks, it would not heal for years; will you please turn to the passage in Keene to which you have reference?

“Judge THOMPSON.—Shakes his head (indicating he would not allow the question).

“Judge STANLEY.—Your Honor refuses to allow it?



“Judge THOMPSON.—Getting beyond the rules of evidence.”

To which ruling defendant—plaintiff in error—noted an exception, which exception was duly allowed and which ruling is hereby assigned as error. (Trans. of Ev., p. 119.)

#### ASSIGNMENT OF ERROR No. 16.

That thereafter at the conclusion of the recross-examination of the said witness the following proceedings were had:

“Judge STANLEY.—I now move, if the Court please, to strike out all the evidence given by Dr. Osorio to the effect that the authorities named by him supported the proposition advanced by him, on the ground that the defendant has not been allowed to cross-examine the witness on that statement, and to have the books and authority referred to by the Doctor, De Costa, to enable counsel to cross-examine him.

“Judge THOMPSON.—The Court overrules the motion.”

To which ruling defendant—plaintiff in error—noted an exception, which exception was duly allowed and which ruling is hereby assigned as error. (Trans. of Ev., p. 122.)

#### ASSIGNMENT OF ERROR No. 17.

That the Court erred in overruling the defendant's motion for a nonsuit in said action made upon the ground that the plaintiff's—defendant in error—own evidence affirmatively showed such contributory negligence on her own part as to preclude

any recovery by her, to which ruling defendant—plaintiff in error—noted an exception, which exception was duly allowed [12] and which ruling is hereby assigned as error. (Trans. of Ev., p. 133.)

#### ASSIGNMENT OF ERROR No. 18.

That the Court erred in giving the jury, against the objection of the defendant—plaintiff in error—the following instruction (No. 4) requested by the plaintiff—defendant in error—to wit:

“You are also charged that it is not the law that a person passing along a sidewalk in a city, who has no knowledge of any defects therein, is required to be constantly watching for holes in or for obstructions upon, the walk, but he has the right to assume that the walk is in a reasonably safe condition and to act upon that assumption.”

and to the giving of which instruction defendant—plaintiff in error—duly excepted.

#### ASSIGNMENT OF ERROR No. 19.

That the Court erred in giving to the jury, against the objection of the defendant—plaintiff in error—the following instruction (No. 5) requested by the plaintiff—defendant in error—to wit:

“You are instructed that in the use of the elevator shaft in question the defendant was bound under the law to the exercise of reasonable care and diligence for the safety of such persons as had occasion to use the sidewalk over said shaft, and it is for you to determine whether in this case the defendant used due



diligence to protect the traveling public against falling into this open shaft. And upon the question as to whether defendant exercised reasonable care and prudence in this respect, you may consider the location of this shaft, whether the defendant could expect persons using the sidewalk while the shaft was open, whether or not defendant should have guarded or protected the opening so that persons passing along would not be likely to fall into it, and if so, whether defendant did so guard and protect said opening, and you may consider such other circumstances to be found in the evidence as will have a direct bearing upon this question.”

and to the giving of which instruction defendant—plaintiff in error—duly excepted.

#### ASSIGNMENT OF ERROR No. 20.

That the Court erred in giving to the jury, against [13] the objection of the defendant—plaintiff in error—the following instruction (No. 6) requested by the plaintiff—defendant in error—to wit:

“You are instructed that while the plaintiff was bound to use care for her own safety in walking along the sidewalk, the care required of her was not the highest degree of care or prudence, nor was it that degree of care that an unusually cautious man or a man of extraordinary prudence would have exercised, but the degree of care expected of the plaintiff was that which an ordinarily prudent person

would have exercised under similar circumstances. And in this connection you are charged that the fact merely that plaintiff's attention was diverted at the time of the injury does not establish contributory negligence as a matter of law."

and to the giving of which instruction defendant—plaintiff in error—duly excepted.

#### ASSIGNMENT OF ERROR No. 21.

That the Court erred in giving to the jury against the objection of the defendant—plaintiff in error—the following instruction (No. 7) requested by the plaintiff—defendant in error—to wit:

"Upon the question as to whether or not plaintiff was guilty of contributory negligence in failing to observe the opening into which she fell, you may consider the location of this shaft, the extent to which it covered the sidewalk, whether or not the sidewalk was on a business street, whether or not she acted reasonably in diverting her attention, if her attention was diverted, her age, and such other facts to be found in the evidence bearing upon this issue, and all in the light of the fact that she had a right to assume that the sidewalk was in a reasonably safe condition."

and to the giving of which instruction defendant—plaintiff in error—duly excepted.

#### ASSIGNMENT OF ERROR No. 22.

That the Court erred in giving to the jury, against the objection of the defendant—plaintiff

in error—the following instruction (No. 8) requested by the plaintiff—defendant in error—to wit:

“You are further instructed that the mere fact that plaintiff knew of the existence of this elevator shaft and failed [14] to avoid it or failed to look for it in passing to determine whether or not it was open at the time does not render her guilty of contributory negligence, as a matter of law and will not as a matter of law preclude her from recovering.”

#### ASSIGNMENT OF ERROR No. 23.

That the Court erred in giving to the jury, against the objection of the defendant—plaintiff in error—the following instruction (No. 10) requested by the plaintiff—defendant in error—to wit:

“The Court further instructs the jury that she (the plaintiff) sued for pain and suffering, which she claims to have sustained. Now, that comes under the general head of pain and suffering. There is no mathematical measure given by law for this. You will ascertain from the evidence, if defendant is liable, how much pain and suffering, mentally and bodily has been undergone by plaintiff, and how much she will undergo, if the evidence discloses it. Then you will find for her what you, as impartial jurors, would find from the evidence to be fairly compensatory to her, but in no event in a sum in excess of the amount of \$11,500.”

#### ASSIGNMENT OF ERROR No. 24.

That the jury in said cause rendered a verdict in

favor of the plaintiff and against the defendant in the sum of Seven Thousand Two Hundred and Fifty Dollars (\$7250) to which verdict defendant—plaintiff in error—then and there excepted on the grounds that the same was contrary to the law and the evidence and the weight of the evidence and on the further ground that it was excessive, which exception was duly allowed and which ruling is hereby assigned as error.

#### ASSIGNMENT OF ERROR No. 25.

That on the first day of June, 1921, judgment in the said cause was entered in favor of the plaintiff and against the defendant—plaintiff in error—for the sum of Seven Thousand Two Hundred and Fifty Dollars (\$7250) and costs taxed at \$26.75, and thereafter the defendant—plaintiff in error—duly made a motion to vacate and set aside the said verdict and the said judgment and to grant a new trial of said cause, which motion the trial court on the 16th day of November, [15] 1921 denied; to which ruling exception was duly allowed and which ruling is hereby assigned as error.

WHEREFORE and in order that the foregoing assignment of errors may be and appear of record, the said defendant as plaintiff in error herein, now presents and files the same in this Honorable Court and prays that the same be considered and disposed of in accordance with law, and that the verdict rendered and entered in said cause be set aside, and the judgment thereon reversed.

Respectfully submitted this 23d day of November, 1921.

HOFFSCHLAEGER COMPANY, LIMITED,

By Its Attorneys,

SMITH, WARREN & STANLEY.

[Endorsed]: No. 1360. In the Supreme Court of the Territory of Hawaii. Margaret Fraga, by Alfred Fraga, Her Guardian *ad Litem*, Plaintiff-Defendant in Error, vs. Hoffschlaeger Company, Limited, Defendant-Plaintiff in Error. Assignment of Errors. Received and filed in the Supreme Court November 23, 1921, at 3:13 o'clock P. M. J. A. Thompson, Clerk. Smith, Warren & Stanley, Attorneys at Law, Bank of Hawaii Bldg., Honolulu, T. H. [16]

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In the Supreme Court of the Territory of Hawaii.

No. 1360.

MARGARET FRAGA, by ALFRED FRAGA,

Her Guardian *ad Litem*,

Plaintiff-Defendant in Error,

vs.

HOFFSCHLAEGER COMPANY, LIMITED,

Defendant-Plaintiff in Error.

**Defendant's Bond on Writ of Error.**

(Under Section 2527, R. L. 1915, as amended by Section 6 of Act 44 Session Laws of 1919.)

KNOW ALL MEN BY THESE PRESENTS:  
That Hoffschlaeger Company, Limited, an Ha-



waiian corporation, as principal, and Hartford Accident and Indemnity Company, a corporation duly organized under the laws of the State of Connecticut (authorized to do a surety business in the Territory of Hawaii, and having its Honolulu office with the American Factors, Limited, in Honolulu, in said Territory), as surety, are held and firmly bound unto Margaret Fraga, plaintiff-defendant in error, in the above-entitled cause, in the sum of Eight Thousand Dollars (\$8000) to be paid to the said Margaret Fraga or her heirs, executors or administrators, for the payment of which, well and truly to be made, they do hereby bind themselves and their respective successors firmly by those presents.

Signed and sealed at Honolulu, Territory of Hawaii, the 23d day of November, 1921.

THE CONDITION of the above obligation is such that whereas the above-named Margaret Fraga, as plaintiff in that certain action at law entitled Margaret Fraga, by Alfred Fraga, Her Guardian *ad Litem*, Plaintiff, vs. Hoffschlaeger Company, Limited, Defendant, did on the 1st day of June, 1921, recover a judgment in the Circuit Court of the Fourth Judicial Circuit, Territory of Hawaii, against the said Hoffschlaeger Company, Limited, as defendant, in the sum of Seven Thousand Two Hundred Seventy-six and 75/100 Dollars (\$7,276.75) upon the verdict of a jury rendered in said action on the 27th day of May, 1921, and the said defendant, named as Principal on this bond, has, as plaintiff in error, made application

or is about to make application to the Clerk of the Supreme Court of the Territory of Hawaii for the issuance of a writ of error in said action:

NOW THEREFORE, if the said Hoffschlaeger Company, Limited, as defendant-plaintiff in error as aforesaid shall, in case of failure to sustain the said writ of error, pay to the said Margaret Fraga, plaintiff-defendant in error, or her heirs, executors or administrators, the judgment rendered against it in said original cause as aforesaid,—then this obligation shall be void; otherwise the same to remain in full force and virtue. [17]

IN WITNESS WHEREOF said Principal and Surety herein named have caused this instrument to be duly executed in their corporate names and behalf on this 23d day of November, 1921.

HOFFSCHLAEGER COMPANY, LIMITED,

By R. F. LANGE, (Seal)  
Pres.

By H. G. DANFORD,  
Acting Tresr.-Secty.

HARTFORD ACCIDENT AND INDEMNITY COMPANY,

By SHERWOOD M. LOWREY,  
Attorney-in-Fact.

[Endorsed]: No. 1360. In the Supreme Court for the Territory of Hawaii. Margaret Fraga, by Alfred Fraga, Guardian *ad Litem*, Plaintiff-Defendant in Error, vs. Hoffschlaeger Company, Defendant-Plaintiff in Error. Defendant's Bond on Writ of Error. Received and filed in the Supreme

Court, November 23, 1921, at 3:13 o'clock P. M.  
J. A. Thompson, Clerk. Smith, Warren & Stanley,  
Attorneys at Law, Bank of Hawaii Bldg., Honolulu,  
T. H. [18]

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In the Supreme Court of the Territory of Hawaii.

No. 1360.

ON ERROR SUED OUT BY THE DEFEND-  
ANT.

MARGARET FRAGA, by ALFRED FRAGA,  
Her Guardian ad Litem,  
Plaintiff-Defendant in Error,  
vs.

HOFFSCHLAEGER COMPANY, LIMITED,  
Defendant-Plaintiff in Error.

**Praecipe for Transcript of Record.**

To the Clerk of the Circuit Court, of the Fourth  
Judicial Circuit, Territory of Hawaii:

Pursuant to the writ of error issued in the above-  
entitled cause you are hereby directed to transmit  
to the Supreme Court of the Territory of Hawaii  
the record in the above-entitled cause, including the  
documents hereinafter referred to:

- (1) Plaintiff's complaint for damages;
- (2) Defendant's answer to said complaint;
- (3) Suggestion of disqualification of Hon. J. W.  
Thompson;
- (4) Decision of Hon. J. W. Thompson on said  
suggestion;



- (5) Defendant's motion for withdrawal of juror and for entry of mistrial;
- (6) All affidavits and counter-affidavits filed in connection with said motion;
- (7) Decision of Hon. J. W. Thompson on said motion;
- (8) Verdict of jury;
- (9) Judgment for the plaintiff; [19]
- (10) Defendant's motion for new trial, together with all exhibits, affidavits and counter-affidavits filed in connection with said motion;
- (11) Decision of Hon. Homer L. Ross denying said motion for new trial;
- (12) Order denying said motion for new trial;
- (13) All exhibits received during the trial of said cause;
- (14) The requested instructions to the jury presented by the plaintiff-defendant in error;
- (15) The instructions to the jury as given by the Judge presiding at the trial of the said cause;
- (16) The transcript of the stenographer's notes of evidence adduced at the trial of said cause, together with the notes of exceptions taken and motions made by the defendant-plaintiff in error; and
- (17) The Clerk's minutes in said court and cause, including notes of exceptions taken by the defendant-plaintiff in error:

Dated: Honolulu, T. H., November 23d, 1921.

HOFFSCHLAEGER COMPANY, LIM-  
ITED,

By Its Attorneys,  
SMITH, WARREN & STANLEY.

[Endorsed]: No. 1360. In the Supreme Court of the Territory of Hawaii. Margaret Fraga, by Alfred Fraga, Her Guardian *ad Litem*, Plaintiff-Defendant in Error, vs. Hoffschlaeger Company, Limited, Defendant-Plaintiff in Error. Praecipe. Received and filed in the Supreme Court, November 23, 1921, at 3:13 o'clock P. M. J. A. Thompson, Clerk. Smith, Warren & Stanley, Attorneys at Law, Bank of Hawaii Bldg., Honolulu, T. H. [20]

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In the Supreme Court of the Territory of Hawaii.

No. 1360.

ON ERROR SUED OUT BY THE DEFEND-  
ANT.

MARGARET FRAGA, by ALFRED FRAGA,  
Her Guardian *ad Litem*,  
Plaintiff-Defendant in Error,  
vs.

HOFFSCHLAEGER COMPANY, LIMITED,  
Defendant-Plaintiff in Error.

**Acknowledgment of Service of Application for  
Writ of Error and Assignment of Errors.**

The undersigned hereby acknowledge the receipt this 28th day of November, 1921, from Messrs.

Smith, Warren & Stanley, attorneys for the defendant-plaintiff in error, of copy of the notice that on the 23d day of November, 1921, the defendant-plaintiff in error filed its application in the Supreme Court of the Territory of Hawaii for a writ of error in the above cause, and also of a copy of the assignment of errors relied upon by the defendant-plaintiff in error.

RUSSELL & PATTERSON,  
Attorneys for Margaret Fraga, Plaintiff-Defendant  
in Error.

Dated: Hilo, Hawaii, November 28th, 1921.

We hereby certify that an original notice & not "copy" of notice was served on Messrs. Russell & Patterson.

Nov. 29th, 1921.

SMITH, WARREN & STANLEY,  
Attys. for Deft.-Plaintiff in Error.

[Endorsed]: No. 1360. In the Supreme Court of the Territory of Hawaii. Margaret Fraga by Alfred Fraga, Her Guardian *ad Litem*, Plaintiff-Defendant in Error, vs. Hoffschlaeger Company, Limited, Defendant-Plaintiff in Error. Acknowledgment of Service, Filed November 29, 1921, at 10:00 A. M. J. A. Thompson, Clerk. [21]

In the Supreme Court of the Territory of Hawaii.

No. 1360.

MARGARET FRAGA, by ALFRED FRAGA,  
Her Guardian ad Litem,

Plaintiff-Defendant in Error.

vs.

HOFFSCHLAEGER COMPANY, LIMITED,  
Defendant-Plaintiff in Error.

**Writ of Error.**

The Territory of Hawaii, to the Clerk of the Circuit Court of the Fourth Judicial Circuit, Territory of Hawaii.

Application having been made on behalf of Hoffschlaeger Company, Limited, the defendant-plaintiff in error above named, for a writ of error in the above-entitled cause, you are commanded forthwith to send to the Supreme Court of the Territory of Hawaii the record in said cause in accordance with the praecipe, a copy of which is hereto attached.

WITNESS the Honorable S. B. KEMP, Associate Justice of the Supreme Court of the Territory of Hawaii this 23d day of November, 1921.

[Seal]

J. A. THOMPSON,

Clerk of the Supreme Court of the Territory of Hawaii.

Received the above writ of error on this 25th day of November, 1921, at 10:35 A. M.

A. K. AONA,  
Clerk of the Circuit Court of the Fourth Judicial  
Circuit, Territory of Hawaii.

To the Clerk of the Supreme Court:

The execution of the within writ of error appears by the record hereto annexed.

Dated, Hilo, Hawaii, December 9, 1921.

[Seal] A. K. AONA,  
Clerk of the Circuit Court of the Fourth Judicial  
Circuit, Territory of Hawaii. [22]

In the Supreme Court of the Territory of Hawaii.

No. 1360.

ON ERROR SUED OUT BY THE DEFEND-  
ANT.

MARGARET FRAGA, by ALFRED FRAGA,  
Her Guardian ad Litem,  
Plaintiff-Defendant in Error,  
vs.

HOFFSCHLAEGGER COMPANY, LIMITED,  
Defendant-Plaintiff in Error,

PRAECIPE FOR TRANSCRIPT OF RECORD.  
To the Clerk of the Circuit Court of the Fourth  
Judicial Circuit, Territory of Hawaii:

Pursuant to the writ of error issued in the above-entitled cause you are hereby directed to transmit to the Supreme Court of the Territory of Hawaii

the record in the above-entitled cause, including the documents hereinafter referred to:

- (1) Plaintiff's complaint for damages;
- (2) Defendant's answer to said complaint;
- (3) Suggestion of disqualification of Hon. J. W. Thompson;
- (4) Decision of Hon. J. W. Thompson on said suggestion;
- (5) Defendant's motion for withdrawal of juror and for entry of mistrial;
- (6) All affidavits and counter-affidavits filed in connection with said motion;
- (7) Decision of Hon. J. W. Thompson on said motion;
- (8) Verdict of jury;
- (9) Judgment for the plaintiff;
- (10) Defendant's motion for new trial, together with all exhibits, affidavits and counter-affidavits filed in connection with said motion;
- (11) Decision of Hon. Homer L. Ross denying said motion for new trial; [23]
- (12) Order denying said motion for new trial;
- (13) All exhibits received during the trial of said cause;
- (14) The requested instructions to the jury presented by the plaintiff-defendant in error;
- (15) The instructions to the jury as given by the Judge presiding at the trial of the said cause;



- (16) The transcript of the stenographer's notes of evidence adduced at the trial of said cause, together with the notes of exceptions taken and motions made by the defendant-plaintiff in error; and
- (17) The Clerk's minutes in said court and cause, including notes of exceptions taken by the defendant-plaintiff in error:

Dated: Honolulu, T. H., November 23d, 1921.

HOFFSCHLAEGER COMPANY, LIMITED,

By Its Attorneys,

(Sgd.) SMITH, WARREN & STANLEY.

[Endorsed]: #1360. In the Supreme Court of the Territory of Hawaii. Margaret Fraga, by Alfred Fraga, Her Guardian *ad Litem*, Plaintiff-Defendant in Error, vs. Hoffschlaeger Company, Limited, Defendant-Plaintiff in Error. Writ of Error. Filed and Issued November 23, 1921, at 3:13 P. M. J. A. Thompson, Clerk. Returned December 17, 1921, at 9:50 A. M. J. A. Thompson, Clerk. [24]

In the Circuit Court of the Fourth Judicial Circuit,  
Territory of Hawaii.

DAMAGES.

MARGARET FRAGA, by ALFRED FRAGA,  
Her Guardian *ad Litem*,

Plaintiff,

vs.

HOFFSCHLAEGER CO., LTD.,

Defendant.

**Bill of Complaint.**

To the Honorable CLEMENT K. QUINN, Judge  
of the Circuit Court in and for the Territory  
of Hawaii:

The petition of the above-named plaintiff respectfully shows and presents to this Court the following facts:

That Margaret Fraga is a minor of the age of thirteen years, and that Alfred Fraga, the above-named guardian *ad litem* is the father of said child and was duly and legally appointed guardian *ad litem* of said minor for the purpose of instituting this action on the 3d day of December, 1920, and before the filing of this complaint.

That the above-named defendant is now and during all of the time mentioned in this complaint has been a corporation duly organized and existing under and by virtue of the laws of the Territory of Hawaii.

That said defendant carries on a general wholesale business on Keawe Street, in the City of Hilo,

County and Territory of Hawaii, between Shipman Street and Waianuenue Avenue, and maintains and operates in front of its said premises on said Keawe Street in the public sidewalk a sidewalk elevator which is used for the [25] purpose of carrying goods from the basement of said defendant's place of business to the sidewalk and at the top of said elevator there is an opening in said sidewalk approximately four feet in width and five feet in length.

That when said opening is closed the doors lay even with the sidewalk and become a part and portion of the sidewalk and are used by pedestrians for the purpose of walking on said sidewalk.

That on or about the 20th day of August, 1920, this plaintiff was walking along said sidewalk from Waianuenue Avenue and proceeding toward Shipman Street and that on said date and at the time and place while plaintiff was so walking along said Keawe Street, the defendant carelessly and negligently without due regard to the public who were then and there using said sidewalk permitted and allowed one door of said opening to remain open while the said elevator was at the bottom of the shaft about ten feet from the level of the sidewalk.

That while plaintiff was so walking along said sidewalk she, the said plaintiff, fell into the said opening and fell to the bottom of said shaft and was greatly injured by said fall in the following respects:

That plaintiff suffered a laceration of her upper eyelid; abrasion of her left elbow and right arm;

abrasion of right forearm; injury to right hip and left hip; strained her back; fracture of epiphysiolysis of tibia left leg; strained right foot; injury to right knee, and concussion of the head.

That said injuries so received by this plaintiff were wholly due to the carelessness and negligence of said defendant in allowing and permitting said opening in said sidewalk to remain open and unguarded, the plaintiff being then and there wholly [26] unaware of any danger and was caused without fault or negligence on the part of this plaintiff.

That by reason of said accident this plaintiff was rendered sick, sore and lame and has suffered and will continue to suffer great and grievous mental and physical pain and anguish and will for a long time continue to suffer great and grievous mental and physical pain and anguish until such time as the wounds and injuries received by her have completely healed.

That by reason of said injuries this plaintiff has and is damaged in the sum of \$11,500.00.

WHEREFORE, plaintiff prays judgment against the defendant in the sum of \$11,500.00, together with interest and costs of suit.

MARGARET FRAGA.

By \_\_\_\_\_,

(Sgd.) ALFRED FRAGA,

Her Guardian *ad Litem*.

(Sgd.) RUSSELL & PATTERSON,

Attorneys for the Plaintiff.

Territory of Hawaii,  
County of Hawaii,—ss.

Alfred Fraga, being first duly sworn upon oath deposes and says: That he is the duly qualified and acting guardian *ad litem* of the plaintiff in the foregoing complaint; that he has read the said complaint, knows the contents thereof and that the same is true.

(Sgd.) ALFRED FRAGA.

Subscribed and sworn to before me this 3d day of December, 1920.

[Seal] (Sgd.) FRED PATTERSON,  
Notary Public, Fourth Circuit, Territory of Hawaii. [27]

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In the Circuit Court of the Fourth Circuit, Territory of Hawaii,

Holding Terms at Hilo, County of Hawaii.

MARGARET FRAGA, by ALFRED FRAGA,  
Her Guardian ad Litem,  
Plaintiff,

vs.

HOFFSCHLAEGGER COMPANY, LTD.,  
Defendant.

**Term Summons.**

The Territory of Hawaii: To the High Sheriff of the Territory of Hawaii, or His Deputy; the Sheriff of the County of Hawaii, or His Deputy:

YOU ARE COMMANDED to summon Hoffschlaeger Co., Ltd., defendant, in case it shall file written answer within twenty days after service hereof to be and appear before the said Circuit Court at the term thereof pending immediately after the expiration of twenty days after service hereof; provided, however, if no term be pending at such time, then to be and appear before the said Circuit Court at the next succeeding term thereof, to wit, the January Term thereof, to be holden at Hilo, County of Hawaii, on Wednesday, the — day of January next, at 10 o'clock A. M., to show cause why the claim of Margaret Fraga, plaintiff, should not be awarded to her pursuant to the tenor of her annexed complaint. And have you then there this writ with full return of your proceedings thereon.

WITNESS the Honorable CLEMENT K. QUINN, Judge of the Circuit Court of the Fourth Circuit, at Hilo, Hawaii, this 3d day of December, 1920.

[Seal]

(Sgd.) T. J. RYAN,  
Clerk.

Served the within summons on Hoffschlaeger Co., Ltd., therein named as defendant, at Honolulu, City and County of Honolulu, Territory of



Hawaii, this 27th day of December, A. D. 1920, by delivering to R. F. Lange, its president, a certified copy hereof and of the petition, order and complaint annexed hereto and at the same time showing him the original.

Dated at Honolulu, City and County of Honolulu, Territory of Hawaii, this 27th day of December, A. D. 1920.

(Sgd.) PATRICK GLEASON,  
Deputy High Sheriff, T. H.

[Endorsed]: L. No. 791. Doc. 3, pg. 213. Circuit Court, Fourth Circuit. Margaret Fraga, by Alfred Fraga, Her Guardian *ad Litem*, Plaintiff, vs. Hoffschlaeger Company, Ltd., Defendant. Term Summons. Issued at 10:20 o'clock A. M., December 3, 1920. (Sgd.) T. J. Ryan, Clerk. Returned at 9 o'clock A. M., December 31, 1920. (Sgd.) T. J. Ryan, Clerk.

R. F. Lange, Pres. (27)

Received at 9:20 o'clock A. M., December 21, 1920.

(Sgd.) H. K. MARTIN,  
Deputy Sheriff, County of Hawaii.

Received 9 A. M., December 26, A. D. 1920.  
High Sheriff's Of.

(Sgd.) P. GLEASON,  
Deputy High Sheriff. [28]

In the Circuit Court of the Fourth Judicial Circuit,  
Territory of Hawaii.

**DAMAGES.**

MARGARET FRAGA, by ALFERD FRAGA,  
Her Guardian ad Litem,

Plaintiff,

vs.

HOFFSCHLAEGER COMPANY, LIMITED,  
Defendant.

**Answer of Defendant.**

Comes now the defendant, by its attorneys, Smith, Warren & Stanley, and for answer to the plaintiff's complaint in the above-entitled cause says that it denies each and every allegation therein contained.

Dated: Honolulu, T. H., January 12th, 1921.

HOFFSCHLAEGER COMPANY, LIMITED,

By SMITH, WARREN & STANLEY,  
Its Attorneys.

[Endorsed]: L. No. 791. Doc. 3, p. 213. Circuit Court, Fourth Circuit, Territory of Hawaii. Margaret Fraga, by Alfred Fraga, Her Guardian *ad Litem*, Plaintiff, vs. Hoffschlaeger Company, Ltd., Defendant. Answer of Defendant. Filed at 11:20 o'clock A. M., January 13, 1921. (Sgd.) Irma Patten, Clerk. [29]

In the Circuit Court of the Fourth Circuit, Territory of Hawaii.

MARGARET FRAGA, by ALFRED FRAGA,  
Her Guardian ad Litem,

Plaintiff,

vs.

HOFFSCHLAEGER COMPANY, LTD.,  
Defendant.

**Suggestion of Disqualification of the Honorable  
J. W. Thompson as Judge in this Cause.**

Comes now the defendant Hoffschlaeger Company, Limited, and specifically appearing herein by its attorneys Messrs. Smith, Warren & Stanley, and suggest the disqualification of the Honorable J. W. Thompson, Judge of the Circuit Court of the Third Judicial Circuit of the Territory of Hawaii to preside at the trial of the above-entitled cause or enter any order or judgment therein for the reasons following, to wit:

That the term of the Honorable Clement K. Quinn as Judge of said Fourth Circuit Court expired on the 4th day of March, A. D., 1921, and since said last-named date there has been no qualified Judge of said Fourth Circuit Court;

That the request of the Chief Justice and/or the Supreme Court of the Territory of Hawaii that the said Honorable J. W. Thompson act temporarily as Judge of the Fourth Circuit Court of said Territory is illegal and not authorized by statute, and the said Chief Justice and/or the Supreme Court had no jurisdiction to make said

request of to authorized the said Honorable J. W. Thompson to act as said Judge.

HOFFSCHLAEGER COMPANY, LIMITED,

By (Sig.) SMITH, WARREN & STANLEY,  
Its Attorney.

By \_\_\_\_\_.

[Endorsed]: L. No. 791. Doc. 3, pg. 213.  
Margaret Fraga, by Alfred Fraga, Her Guardian  
*ad Litem*, Plff., vs. Hoffschlaeger Company, Ltd.,  
Deft. Suggestion of Disqualification of the Hon-  
orable J. W. Thompson as Judge in this Cause.  
Filed at 10:10 o'clock A. M., May 23, 1921. (Sig.)  
Thomas Pedro, Jr., Asst. Clerk. [30]

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In the Supreme Court of the Territory of Hawaii.  
In the Matter of a SUBSTITUTE JUDGE IN  
THE FOURTH CIRCUIT.

**Appointment of Honorable J. Wesley Thompson  
to Preside as Judge of Fourth Circuit Court.**

To the Honorable J. WESLEY THOMPSON,  
Judge of the Circuit Court of the Third Judi-  
cial Circuit, Territory of Hawaii.

Owing to a vacancy existing in the office of Judge  
of the Circuit Court of the Fourth Judicial Cir-  
cuit of the Territory of Hawaii, I hereby request  
and authorize you to preside at the trial of any  
cause or causes pending in the Circuit Court of  
the Fourth Circuit, or in Chambers in such circuit.

WITNESS MY HAND and the seal of the Supreme Court of the Territory of Hawaii, at Honolulu, City and County Honolulu, this 5th day of March, A. D. 1921.

(Signed ) JAMES L. COKE,  
Chief Justice of the Supreme Court of the Territory of Hawaii.

[Seal] Attest: (Signed) J. A. THOMPSON,  
Clerk Supreme Court.

[Endorsed]: Appointment of Honorable J. Wesley Thompson to Preside as Judge of the Fourth Circuit Court. Filed at 9:15 o'clock A. M., March 9, 1921. (Signed) T. J. Ryan, Clerk. [31]

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In the Circuit Court of the Fourth Judicial Circuit,  
Territory of Hawaii.

MARGARET FRAGA, by ALFRED FRAGA,  
Her Guardian ad Litem,

Plaintiff,

vs.

HOFFSCHLAEGER COMPANY, LTD.,  
Defendant.

**Court's Decision and Ruling on Motion.**

The defendant by its attorneys filed in this court what it, the defendant, was pleased to call a "Suggestion of Disqualification" of the Judge now presiding in said Fourth Circuit Court.

The Court will treat this so-called suggestion in every particular as a motion and as if it had been so labeled and tabulated.

Section 2277 of the Revised Statutes of Hawaii, the 1915 Edition, sets out and defines fully the method and plan by which a vacancy in any of the Circuit Courts of the Territory, or the disqualification of any Judge to preside may be filled or supplied.

It is a matter of record that the Fourth Judicial Circuit is now without a regular qualified Judge to preside.

There is on file in this court a written request and special commission signed by the Hon. James L. Coke, Chief Justice of the Supreme Court of the Territory of Hawaii, addressed to J. W. Thompson delegating him, the said J. W. Thompson to preside in said Fourth Judicial Circuit.

It is also a matter of record that the said J. W. Thompson is a regular and duly qualified Judge and commissioned as such of the Third Judicial Circuit, Territory of Hawaii.

IT IS THEREFORE the opinion of the Court that every provision of the statute has been fully met and complied with.

The motion is therefore overruled.

This May 24, 1921.

(Sgd.) J. W. THOMPSON,  
Acting Judge of the Circuit Court of the Fourth  
Judicial Circuit, Territory of Hawaii.

[Endorsed]: L. No. 791. Doc. 3, pg. 213. In  
the Circuit Court of the Fourth Judicial Circuit



Territory of Hawaii. January Term A. D. 1921.  
Margaret Fraga, by Alfred Fraga, Her Guardian  
*ad Litem*, Plaintiff, vs. Hoffschlaeger Company,  
Ltd., Defendant. Court's Decision and Ruling on  
Motion. Filed at 9:00 o'clock A. M. May 24, 1921.  
(Sgd.) T. J. Ryan, Clerk. [32]

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In the Circuit Court of the Fourth Judicial Cir-  
cuit, Territory of Hawaii.

DAMAGES.

MARGARET FRAGA, by ALFRED FRAGA,  
Her Guardian ad Litem,  
Plaintiff,

vs.

HOFFSCHLAEGER COMPANY, LIMITED,

**Motion of Defendant for Withdrawal of Juror and  
Entry of Mistrial.**

To the Honorable Presiding Judge of said Court:

Comes now Hoffschlaeger Company, Limited,  
defendant above named, by its attorneys Smith,  
Warren & Stanley and Charles F. Parsons, and  
moves that your Honor withdraw a juror and  
enter a mistrial in the above-entitled cause for  
the reasons following: That on the afternoon of  
Tuesday, May 24th, 1921, there was published in  
"The Daily Post-Herald," a newspaper of general  
circulation in the City of Hilo and the District of  
South Hilo, Island of Hawaii, and generally  
throughout said Island, and under display head-

ing in the first two columns on the front page of said newspaper (a copy of which said newspaper published on said 24th day of May, 1921, is hereto attached marked Exhibit "A," and made a part hereof), a certain article containing certain false, misleading and prejudicial statements regarding the defense of said cause, and that the said newspaper and the said article therein contained has been given wide circulation and has been accessible to the jurors impaneled and sworn in said cause, to the manifest and irreparable injury and prejudice of the defendant herein. [33]

This motion is based upon the affidavit of W. L. Stanley hereto attached, upon the files and records in this cause, and upon such evidence as may be adduced at the hearing hereof.

Dated, Hilo, Hawaii, May 25th, 1921.

HOFFSCHLAEGER COMPANY, LIMITED,

By (Sgd.) SMITH, WARREN & STANLEY,  
(Signed) CHARLES F. PARSONS,  
Its Attorneys.

By \_\_\_\_\_. [34]

### **Exhibit "A."**

#### **FOURTEEN-YEAR-OLD HILO GIRL SEEKS \$11,500 DAMAGES FROM INSURANCE FIRM FOR INJURIES.**

Pretty Miss Margaret Fraga, fourteen-year-old Hilo school girl, fell down a sidewalk elevator shaft, owned by the Hoffschlaeger Company, Ltd., last August.

When her case was called in the Circuit Court this morning she asked for \$11,500 damages for injuries which she declares she suffered from her fall, from which she declares that she has never entirely recovered.

Shortly before noon, the trial jury was completed and the beginning of testimony will start when court convenes this afternoon.

#### Unusual Circumstances.

The circumstances surrounding the case are rather unusual. According to the Insurance company, which is defending the case for the defendant, it is admitted that Miss Fraga was walking along Keawe street and fell down the elevator shaft, but they declare that the complainant did not suffer serious injuries. It is reported that the Insurance company, at the time of the accident, agreed to settle for a small amount of damages. It is admitted that half of the iron grating, which was supposed to cover the shaft, was left unguarded.

Miss Fraga declares that her injuries, both physical and mental, were so serious that she has not entirely recovered. The twelve men who were selected to hear the evidence in the case are as follows: James Davis, George H. Akau, John Kahiawi, Antone J. Kimi, James Kauhulaqua, Charles Johnson, T. O. Mitchell, E. B. Hamauku, A. Arasuda, S. K. Maka, E. A. Namohala, and Harry Hapai.

#### Questions Jurisdiction.

Judges William L. Stanley and Charles F. Parsons are appearing for the Insurance company,

who are shouldering the responsible for the Hoffschlaeger company. It is expected that this case will require two days.

Yesterday, when the case was first called, Judge W. L. Stanley filed a motion that Judge Thompson had no jurisdiction to hear this case. The motion was overruled and the case continued until this morning. [35]

**Affidavit of W. L. Stanley.**

Territory of Hawaii,  
Fourth Judicial Circuit,—ss.

W. L. Stanley, being first duly sworn, on his oath says:

That he is one of the attorneys for Hoffschlaeger Company, Limited, defendant herein; that on the 24th day of May, 1921, a jury was impaneled and sworn to try said cause and on the afternoon of the said day the plaintiff began the introduction of evidence before said jury in support of plaintiff's declaration therein.

That on the afternoon of said last-named day, while said cause was still on trial before said jury, there appeared in "The Daily Post-Herald," a newspaper, under a display heading, and in a prominent part of the first page thereof, the following purported report of and concerning said cause then on trial before said jury, to wit:

**"FOURTEEN-YEAR-OLD HILO GIRL SEEKS  
\$11,500 DAMAGES FROM INSUR-  
ANCE FIRM FOR INJURIES.**

Pretty Miss Margaret Fraga, fourteen year old Hilo school girl, fell down a sidewalk elevator

shaft, owned by the Hoffschlaeger Company, Ltd., last August.

When her case was called in the Circuit Court this morning she asked for \$11,500 damages for injuries which she declares she suffered from her fall, from which she declares that she has never entirely recovered.

Shortly before noon, the trial jury was completed and the beginning of testimony will start when court convenes this afternoon.

#### Unusual Circumstances.

The circumstances surrounding the case are rather unusual. According to the Insurance Company, which is defending the case for the defendant, it is admitted that Miss Fraga was walking along Keawe street and fell down the elevator shaft, but they declare that the complainant did not suffer serious injuries. It is reported that the Insurance Company, at the time of the accident, agreed to settle for a small amount of damages. It is admitted that half of the iron grating, which was supposed to cover the shaft, was left unguarded. [36]

Miss Fraga declares that her injuries, both physical and mental, were so serious that she has not entirely recovered. The twelve men who were selected to hear the evidence in the case are as follows: James Davis, George H. Akau, John Kahiawi, Antone J. Kimi, James Kauhulaqua, Charles Johnson, T. O. Mitchell, E. B. Hamauku, A. Arasuda, S. K. Maka, E. A. Namohala, and Harry Hapai.



## Questions Jurisdiction.

Judges William L. Stanley and Charles F. Parsons are appearing for the Insurance Company, who were shouldering the responsible for the Hoffschlaeger company. It is expected that this case will require two days.

Yesterday when the case was first called, Judge W. L. Stanley filed a motion that Judge Thompson had no jurisdiction to hear this case. The motion was overruled and the case was continued until this morning."

A copy of said issue of said newspaper containing said article is hereto attached and made a part hereof.

That the said article is misleading, false and prejudicial to the rights of the defendant herein in the following respects and for the following reasons, to wit:

That the said action is not against any insurance firm, but against the corporation of Hoffschlaeger Company, Limited; that no unusual circumstances surround the case; that neither defendant nor any insurance company, so far as known to affiant, has declared that Miss Fraga did not suffer serious injury; that no insurance company, so far as known to affiant, agreed to settle for a small, or any amount of damages; that neither W. L. Stanley nor his firm, nor Charles F. Parsons are appearing herein for any insurance company, nor is any insurance company a party to this cause.

That the statement that an insurance company is shouldering the responsibility for Hoffschlaeger



Company, Limited, is true only to the extent that Hoffschlaeger Company, Limited, carry accident and indemnity insurance to an amount far less than the amount herein prayed by plaintiff as damages in the said cause.

That no testimony regarding said insurance company has been admitted, or is admissible in evidence in the trial of said cause. [37]

That the said article first came to the attention of affiant and the said Charles F. Parsons after the adjournment of the court and at about the hour of 6:30 P. M., May 24th, 1921.

That affiant is informed and believes, and upon such information and belief avers that said newspaper is a newspaper of a guaranteed general circulation of 1450 copies, printed and published in Hilo, Hawaii, mailed and delivered to subscribers and for sale daily at the news stands and elsewhere throughout the Island and Territory of Hawaii, and easily accessible to the jurors before whom said cause is now being tried.

That the President of the Hawaii Post-Herald, Limited, the corporation owning and publishing said newspaper, is James W. Russell, Esq., leading counsel for plaintiff in said cause, who is also one of the leading stockholders of said company and the reputed dictator of the policies of said newspaper.

That the said article is highly prejudicial to the rights of defendant herein, and for said reasons affiant believes that defendant cannot now safely proceed with the trial of said cause before said

jury, and that the injury and prejudice to the rights of the defendant occasioned by said article, would and could not be cured by any cautionary instruction to the jury.

(Sgd.) W. L. STANLEY.

Subscribed and sworn to before me this 25th day of May, A. D. 1921.

[Seal] (Signed) B. C. STEWART,

Notary Public, Fourth Judicial Circuit, Territory of Hawaii.

[Endorsed]: L. No. 791. Doc. 3, pg. 213. Circuit Court, Fourth Circuit, Territory of Hawaii. Margaret Fraga, by Alfred Fraga, Her Guardian *ad Litem*, Plaintiff, vs. Hoffschlaeger Company, Ltd., Defendant. Motion of Defendant for Withdrawal of Juror and Entry of Mistrial. Filed at 9:24 o'clock A. M., May 25, 1921. (Sgd.) Thomas Pedro, Jr., Asst. Clerk. [38]

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In the Circuit Court of the Fourth Judicial Circuit, Territory of Hawaii.

DAMAGES.

MARGARET FRAGA, by ALFRED FRAGA,  
Her Guardian ad Litem,

Plaintiff,

vs.

HOFFSCHLAEGER COMPANY, LIMITED,  
Defendant.

**Affidavit of J. W. Russell.**

Territory of Hawaii,  
County of Hawaii,—ss.

J. W. Russell, being first duly sworn, on oath says: That he is one of the attorneys for the plaintiff in the above-entitled cause.

That he read the report published in the "Daily Post-Herald" of May 24, 1921, referred to in the affidavit of W. L. Stanley, Esq., after the said paper had been printed and published, and that he had no knowledge whatsoever prior to the publication of said paper that said article or any reference whatsoever to this case would be published in said paper.

That after the publication of said article your affiant ascertained that the same was prepared and written by one Harold Russell, and your affiant thereupon interviewed said Harold Russell who informed your affiant that the information as to the fact that an insurance company was defending the case and was responsible for any verdict that may be rendered against the defendant and that an offer had been made by the insurance company to the plaintiff was obtained from an interview had by the affiant with one, Karl J. Meinke, who at all times mentioned in the complaint and still is the Manager of the Hilo Branch of the defendant.

Your affiant further says that he is not connected with the active management of the said "Post-Herald," and that he did not know of any news or other article published in said newspaper in ad-

vance of the publication of said paper, and that your affiant does not assume to dictate the character of the news, which should be published in said paper. That as President of the said "Post-Herald," your affiant interests himself solely with respect to the financial policy of said company, and that the said company employs a manager and editor who has charge of the active management of the administrative affairs of said company.

(Signed) J. W. RUSSELL.

Subscribed and sworn to before me this 25th of May, 1921.

(Sgd.) FRED PATTERSON,  
Notary Public, Fourth Circuit, Territory of  
Hawaii.

(S.) [39]

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In the Circuit Court of the Fourth Judicial Circuit,  
Territory of Hawaii.

**DAMAGES.**

MARGARET FRAGA, by ALBERT FRAGA, Her  
Guardian ad Litem,

Plaintiff,

vs.

HOFFSCHLAEGER CO., LIMITED,

Defendant.

**Affidavit of Harold Russell.**

Territory of Hawaii,

County of Hawaii,—ss.

Harold Russell, being first duly sworn, on oath

says: That he is employed by the Hawaii Post-Herald, Limited, as a reporter upon the "Daily Post-Herald," a newspaper published by said company, and that he wrote the article appearing in the issue of said paper of May 24, 1921, relating to the case of Fraga vs. Hoffschlaeger Co.

That all of the information that he had which formed the basis of said article was gathered by him from two interviews had with Karl J. Meinke, the Hilo manager of said defendant. That at the first of said interviews had a few days ago, the said Meinke informed your affiant that said defendant was not concerned about any possible results in this case because of the fact that it carried insurance against liability in such cases and that the insurance company had offered the plaintiff one thousand (\$1,000.00) dollars in settlement of said case but that the plaintiff had refused to accept such offer. That upon the occasion of said interview had with said Meinke in the forenoon of said 24th day of May, your affiant asked the said Meinke why he was not present in Court at the trial of the case, and the said Meinke replied to affiant in effect that it was up to the attorneys for the insurance company who were representing the defense to call him if his presence should be desired, and thereupon affiant asked the said Meinke as to whether he expected to be called as a witness, to which the said Meinke replied that he did not believe so as there was no dispute as to the facts of the accident, the said Meinke further stating to affiant that it was admitted that the girl fell in the



elevator shaft in question and that she was injured, and said Meinke further stated to affiant that the only issue involved was the matter of damages, the insurance company contending that she was not injured as seriously as was claimed by the plaintiff. That affiant had no knowledge from any other source of the facts of said case, except that he ascertained the names of the jurors from another reporter, Mrs. Beth Fox, whom affiant sent to the Court for the purpose of ascertaining the names of the jurors.

Affiant further says that said Meinke at the time of each interview knew that he, the affiant, was a reporter for the said "Post-Herald," and that the information given was [40] for the purpose of publication as a news article for the said "Post-Herald." Affiant further says that neither of the counsel for the plaintiff knew in advance of the publication of said article that said article would be so published.

(Signed) HAROLD RUSSELL.

Subscribed and sworn to before me this 25th day of May, 1921.

(Signed) FRED PATTERSON.

Notary Public, Fourth Circuit, Territory of Hawaii.

(S.)

[Endorsed]: L. No. 791. Doc. 3, pg. 213. In the Circuit Court of the Fourth Judicial Circuit, Territory of Hawaii. Margaret Fraga, by Alfred Fraga, Her Guardian *ad Litem*, Plaintiff, vs. Hoff-



schlaeger Company, Ltd., Defendant. Damages.  
Affidavits of J. W. Russell and Harold Russell.  
Filed at 1:30 o'clock P. M., May 25, 1921.  
(Signed) T. J. Ryan, Clerk. Russell & Patterson,  
Attorneys for Plaintiff. [41]

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In the Circuit Court of the Fourth Judicial Circuit,  
Territory of Hawaii.

MARGARET FRAGA, by ALFRED FRAGA, Her  
Guardian ad Litem,

Plaintiff,

vs.

HOFFSCHLAEGER CO., LTD.,

Defendant.

**Counter-Affidavit of W. L. Stanley.**

City of Hilo,

Island and Territory of Hawaii,—ss.

W. L. Stanley, being duly sworn, on oath deposes and says that he has read the affidavit of Harold Russell, filed on the 28th day of May, A. D. 1921, wherein the said Russell states *inter alia*, that he was informed by Karl Meinke that

“the Insurance Company had offered the plaintiff \$1,000.00 in settlement of said case but that the plaintiff had refused to accept such offer.”

and in reply to said statement, of said Russell, affiant says that, he, affiant, since about the 30th day of August, 1920, had sole charge on behalf of the defendant corporation, and of the Insurance

Company, in part indemnifying the same, of all matters arising out of the accident to the plaintiff on the 20th day of August, 1920, and connected with the above-entitled cause.

That affiant had no acquaintance with, or correspondence with said Meinke or any officer or employee of the Branch House of [42] Hoffschlaeger Co., Lt., in Hilo, until his arrival in Hilo on the 22d instant.

That no offer of settlement, and no proposal of settlement was at any time made to the plaintiff or to her attorneys, or to any other person, save immediately as hereinafter stated.

That on or about August 30, 1920, a letter was written by Fred Patterson, Esq., on behalf of the firm of Russell & Patterson to Hoffschlaeger Company, Ltd., in Hilo, in which it was stated that his firm had been consulted by Mr. Alfred Fraga, with reference to the accident and with a view to recovering damages therefor, and that his firm would be pleased to be informed whether or not some amicable adjustment could be made; that said letter was forwarded to affiant, and that affiant on or about September 4th wrote to Messrs. Russell & Patterson asking them to withhold action for a reasonable time in order to allow affiant to make an investigation into the matters involved, and that on or about September 9th, affiant received a reply acceding to his request.

That towards the end of September affiant had an interview with said Fred Patterson, Esq., at affiant's office in Honolulu, in the course of which

affiant, in response to an inquiry of Mr. Patterson's, as to whether affiant's request for delay had been made in good faith, assured him of that fact, and inquired of Mr. Patterson, what his ideas were or what would constitute a reasonable settlement, and that Mr. Patterson mentioned the figure \$5,000.00.

That subsequently, and about the end of October affiant had another interview with Mr. Patterson in Honolulu, in which the latter again stated to affiant that his lowest figure was \$5,000.00, and in the course of which interview, affiant stated that, in view of what he, affiant, had learned of the circumstances of the accident and of the injuries sustained by plaintiff, the utmost he could recommend by way of settlement would be \$1,000.00. [43]

That the disparity between said two sums of \$1,000.00 and \$5,000.00, was so great, there was no possibility of settlement, and that in view of Mr. Patterson's demand, and its unreasonableness in the opinion of the affiant, the fact that the sum of \$1,000.00 or any other sum had been mentioned by affiant to Mr. Patterson, was never communicated at any time by affiant to the defendant corporation, or any of its officers or employees, or to the Insurance Company, or any of its officers or employees, or to any other person, save and except to C. S. Parsons, Esq., and to him only, after affiant had received and read the affidavit of said Harold Russell filed in the above case as aforesaid.

(Signed) W. L. STANLEY.

Subscribed and sworn to before me this 26th day of May, A. D. 1921.

[Seal] (Signed) B. C. STEWART,  
Notary Public, Fourth Judicial Circuit, Territory  
of Hawaii. [44]

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In the Circuit Court of the Fourth Judicial Circuit,  
Territory of Hawaii.

DAMAGES.

MARGARET FRAGA, by ALFRED FRAGA, Her  
Guardian ad Litem,

Plaintiff,

vs.

HOFFSCHLAEGER COMPANY, LIMITED,  
Defendant.

**Counter-Affidavit of Karl J. Meinke.**

Territory of Hawaii,  
Fourth Judicial Circuit,—ss.

Karl J. Meinke, being first duly sworn, on his oath says:

That he has read the affidavits of James W. Russell and Harold Russell on file herein; that affiant did not, in an interview a few days ago, or at any other time, inform the said Harold Russell that the defendant was not concerned about any possible results in the above-entitled cause, or that the insurance company had offered the plaintiff herein One Thousand Dollars, or any other sum, in settlement of said cause; or that the plaintiff had refused to accept such offer, or any other offer, or

that the only issue involved was the matter of damages, or that the insurance company contended that Margaret Fraga was not injured as seriously as was claimed by the plaintiff.

Affiant admits that he knew that the said Harold Russell was a reporter for the "Post-Herald," but denies that he ever knew or suspected that any information given by affiant to the said Harold Russell was for the purpose of publication as a news article for said "Post-Herald," or for any other newspaper, or at all. [45]

Affiant further says that until quite recently affiant and the said Harold Russell lived in the same house and were intimate friends; that they met several times each day, and spent many of their evenings together playing dominoes; that this intimate acquaintance has continued since the removal of the said Harold Russell to his present quarters in Kau Lane.

That all interviews between affiant and the said Harold Russell have been of an informal and friendly nature; that no suggestion on the part of the said Harold Russell, and no thought on the part of affiant that the same were to be used as a basis for a newspaper article.

That the first mention made by Harold Russell to affiant regarding the above-entitled cause was about ten days ago when notice of the setting of said cause for hearing was published in the Hilo papers, when, to the said Harold Russell's remark that he noticed that said cause had been set for



trial, affiant replied: "I was careful enough to take out liability insurance."

That on the 24th instant, the date on which the newspaper article referred to in said affidavits of James W. Russell, and Harold Russell appeared in said "Daily Post-Herald" the said Harold Russell called three times on affiant at his place of business and asked affiant to go swimming with him, and that on one such occasion the said Harold Russell asked affiant if affiant expected to be called as a witness in said cause, to which question affiant replied that he did not believe so as it was admitted that the girl had fallen into the elevator shaft and that she was injured, and that affiant had not been a witness to the accident, but affiant says that he at no time referred to the attorneys for the defendant as the attorneys for the insurance company, and that he did not [46] say, except as above set forth, that there was no dispute as to the facts of the accident.

Affiant further says that he did not say to the said Harold Russell, nor to anyone else, that an insurance company was defending the said cause and/or was responsible for any verdict that might be rendered against the defendant, and affiant had not, at the time of any of his talks with the said Harold Russell, and has not now, any knowledge, information or belief upon which to base a statement that One Thousand Dollars or any other sum has been offered by any insurance company, by the defendant, or by any other person or persons, firm, association or corporation in full or in partial set-



tlement of said cause, or for any other purpose whatsoever, and/or that any such offer had been refused, and that if such a statement has been made to Harold Russell or James W. Russell it has emanated from some person other than affiant.

Affiant further says that no statement, other than hereinabove set forth, has been made by him to the said Harold Russell in reference to the above-entitled cause.

That the statements made to Harold Russell as hereinabove set forth about ten days ago, at the time of the publication of notice in the Hilo newspapers of the first setting of said cause for trial, were not published in the "Post-Herald" at that time; and no article based thereon was published by said "Post-Herald" until the afternoon of the 24th day of May, 1921, after a jury had been impaneled and sworn to try said cause and the introduction of evidence had commenced, and affiant verily believes that said publication was purposely delayed and was made on said last-named date [47] for the purpose of influencing the jury in said cause, and prejudicing the rights of the defendant therein.

(Signed) KARL J. MEINKE.

Subscribed and sworn to before me this 26th day of May, A. D. 1921.

[Seal]                      Signed B. C. STEWART,  
Notary Public, Fourth Judicial Circuit, Territory  
of Hawaii.

[Endorsed]: L. No. 791. Doc. 3, pg. 213. Circuit Court, Fourth Circuit, Territory of Hawaii. Margaret Fraga, by Alfred Fraga, Her Guardian *ad Litem*, Plaintiff, vs. Hoffschlaeger Company, Ltd., Defendant. Counter-affidavits of Karl J. Meinke and W. L. Stanley. Filed at — o'clock — M. May 26, 1921. (Sgd.) T. J. Ryan, Clerk. [48]

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In the Circuit Court of the Fourth Judicial Circuit,  
Territory of Hawaii.

January Term, A. D. 1921.

**DAMAGES.**

MARGARET FRAGA, by ALFRED FRAGA, Her  
Guardian *ad Litem*,

Plaintiff,

vs.

HOFFSCHLAEGER COMPANY, LTD.,

Defendant.

**Decision and Ruling on Motion of Defendant for  
Withdrawal of Juror and Entry of Mistrial.**

In the above-entitled cause the defendant by its attorney "moves that your Honor withdraw a juror and enter a mistrial."

This is a very unusual motion, in that this Court is asked to withdraw a juror without naming any particular juror. No charge of any nature whatever is made as to the conduct, improper or otherwise, of the jury as a whole or to any juror individually.

Would it not be far beyond the authority or privilege or duty of the Court to single out a single member of that body and dismiss him when no misconduct had been charged?

The Court is of the opinion that it does not have any such authority.

The motion in question is based on the publication of a certain article as published in one of the local daily newspapers, claiming among other matters "that the said article contained false, misleading and prejudicial statements regarding the defense of said cause, and that the said newspaper and the said article therein contained has given wide circulation and has been accessible to the jurors impaneled and sworn in said cause, to the manifest and irreparable injury and prejudice of the defendant herein." [49]

This motion is based on the affidavit of one of the attorneys for the defense, namely, Judge W. L. Stanley.

It is not stated or claimed in the motion or in the affidavit that any of the jurors saw the aforesaid article; or that any of them ever read it or heard it read or ever heard that there was such an article; or that any impression of any nature whatever had been made upon the mind of any juror prejudicial or otherwise.

The Court is of the opinion that the matters complained of are too general in their nature, vague and uncertain.

The facts should be set out so that the Court may be able to judge whether or not the rights of either

the defendant or the plaintiff had been jeopardized rather than conclusions drawn by the author of the affidavit or the draughtsman of the motion.

The newspaper article itself does not purport to be a report of any trial or hearing but purports to be only news gathered from somewhere and does not bear that solemnity or that weight of authority calculated to prejudice or bias the minds of the jury that a proper charge to the jury would not remove.

It appears from the affidavits on file that the reporter who wrote the article gathered his purported information as set out in the article from the resident manager of the defendant company, and from no one else.

It further appears to the Court if any injury has been done, such injury was brought about by the operation of its own acts and it, the defendant, cannot now complain.

If the rule was otherwise no litigation could ever be terminated.

The Court does not believe the rights of anyone have [50] been jeopardized or prejudiced by the publication and circulation of the newspaper article in question.

For these reasons, and other reasons might be given, the Court is of the opinion that the Motion is not well taken, and it is hereby overruled.

May 26, 1921.

(Sgd.) J. W. THOMPSON,  
Acting Judge of the Circuit Court of the Fourth  
Judicial Circuit, Territory of Hawaii.

[Endorsed]: L. No. 791. Dec. 3, pg. 213. In the Circuit Court of the Fourth Judicial Circuit, Territory of Hawaii. January A. D. 1921. Margaret Fraga, by Alfred Fraga, Her Guardian *ad Litem*, Plaintiff, vs. Hoffschlaeger Company, Ltd., Defendant. Damages. Decision and Ruling on Motion of Defendant for Withdrawal of Juror and Entry of Mistrial. Filed at 11:35 o'clock A. M., May 27, 1921. T. J. Ryan, Clerk. [51]

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In the Circuit Court of the Fourth Circuit, Territory of Hawaii.

January Term, 1921.

Judge J. W. THOMPSON, Presiding.

**DAMAGES.**

MARGARET FRAGA, by ALFRED FRAGA,  
Her Guardian *ad Litem*,  
Plaintiff,

vs.

HOFFSCHLAEGER COMPANY, LTD.,  
Defendant.

**Verdict.**

We, the jury in the above-entitled cause, find for the plaintiff and assess and award damages in the sum of Seven Thousand Two Hundred Fifty Dollars (\$7250.00).

(Sgd.) T. O. MITCHELL,  
Foreman.

Dated at Hilo, Hawaii, T. H., May 27, 1921.

[Endorsed]: L. No. 791. Doc. 3, pg. 213. Circuit Court, Fourth Circuit. January Term, 1921. Margaret Fraga, by Alfred Fraga, Her Guardian *ad Litem*, Plaintiff, vs. Hoffschlaeger Company, Ltd., Defendant. Verdict. Filed May 27, 1921, at 2:30 o'clock P. M. (Sgd.) Thomas Pedro, Jr., Clerk. [52]

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In the Circuit Court of the Fourth Judicial Circuit, Territory of Hawaii.

**DAMAGES.**

MARGARET FRAGA, by ALFRED FRAGA,  
Her Guardian *ad Litem*,

Plaintiff,

vs.

HOFFSCHLAEGER COMPANY, LIMITED,  
Defendant.

**Judgment.**

This cause having come on regularly for trial before this Court, the Honorable J. W. Thompson, Judge of the Circuit Court of the Third Judicial Circuit, sitting by assignment in this Court, presiding, and a jury having been regularly impanelled and sworn to try said cause; and after hearing the evidence, arguments of counsel and instructions of said Court, the jury retired to consider of their verdict on the 27th day of May, 1921, and subsequently on the same day returned into court with their verdict, finding for the plaintiff in the sum



of Seven Thousand Two Hundred Fifty (\$7,250.00) Dollars, it is therefore:

ADJUDGED, that the plaintiff, Margaret Fraga, by Alfred Fraga, her guardian *ad litem*, recover of the defendant, Hoffschlaeger Company, Limited, the sum of Seven Thousand Two Hundred and Fifty (\$7,250.00) Dollars, as damages, and costs taxed at \$26.75.

Dated: Hilo, Hawaii, T. H., this 1st day of June, 1921.

(Sgd.) T. J. RYAN,  
Clerk.

O. K. as to form.  
[Seal]

C. F. PARSONS,  
Of Counsel for Defendant.

[Endorsed]: L. No. 791. Doc. 3, pg. 213. In the Circuit Court of the Fourth Judicial Circuit, Territory of Hawaii. Margaret Fraga, by Alfred Fraga, Her Guardian *ad Litem*, Plaintiff, vs. Hoffschlaeger Company, Ltd., Defendant. Damages. Judgment, Plaintiff's Bill of Costs and Notice. Filed at 3 o'clock P. M., June 1, 1921. (Sgd.) T. J. Ryan, Clerk. [53]

In the Circuit Court of the Fourth Judicial Circuit,  
Territory of Hawaii.

**DAMAGES.**

MARGARET FRAGA, by ALFRED FRAGA,  
Her Guardian ad Litem,

Plaintiff,

vs.

HOFFSCHLAEGER COMPANY, LIMITED,  
Defendant.

**Motion for New Trial**

Now comes Hoffschlaeger Company, Limited, defendant in the above-entitled cause, and hereby moves this Honorable Court to grant a new trial of the said cause upon the following grounds:

**I.**

That the verdict of the jury rendered in said cause on the 27th day of May, 1921, in favor of the plaintiff and against the defendant for the sum of Seven Thousand Two Hundred and Fifty Dollars (\$7250) was and is contrary to the law and the evidence and the weight of the evidence.

**II.**

That the said verdict was and is excessive.

**III.**

Because of errors of law which occurred in the trial of said cause, including the following:

(a) That the Court erred in overruling the suggestion of the disqualification of the Honorable J. Wesley Thompson, Judge of the Circuit Court

of the Third Circuit, Territory of Hawaii, to preside at the trial of said cause, or to enter any order [54] therein, said suggestion having been duly made and filed by the defendant on, to wit, the 23d day of May, 1921.

(b) That the Court erred in overruling and denying the defendant's motion to withdraw a juror and to enter a mistrial of the said cause, said motion having been filed by the defendant on, to wit, the 25th day of May, 1921,

(c) That the Court erred in refusing to allow the defendant to cross-examine one V. E. M. Osorio, a witness called for the plaintiff, as to the contents of certain medical and surgical authorities, works and books of reference mentioned and referred to by the said witness as supporting his testimony in the course of his cross-examination, and in refusing to order that the said authorities, works and books of reference be produced in court so that the witness might be cross-examined thereon and the testimony in relation thereto, and in refusing to allow the defendant to cross-examine the said witness as to the contents of certain medical and surgical authorities, works and books of reference mentioned and referred to by the said witness as supporting his testimony in the course of his redirect examination.

(d) That the Court erred in refusing to grant the defendant's motion for a nonsuit.

(e) That the Court erred in the admission by the Court of evidence, oral and written, offered by

the plaintiff over the objections and exceptions of the defendant.

(f) That the Court erred in the rejection by the Court of evidence, oral and written, offered by the defendant.

(g) That the Court erred in erroneously restricting the proper cross-examination by the defendant of certain witnesses called for the plaintiff.

(h) That the Court erred in giving to the jury certain instructions requested by the plaintiff over the objections and [55] exceptions of the defendant, said instructions being plaintiff's instructions numbered 4, 5, 6, 7, 8, 10, 11 and 12.

(i) That the Court erred in the instructions given by the Court to the jury of its own motion.

#### IV.

That since the trial of the said cause the defendant has discovered new evidence which, if known to the Court prior to the rendition by the jury of its verdict in said cause, would have materially affected the Court's action in ruling on the defendant's motion to withdraw a juror and enter a mistrial of said cause, said evidence tending strongly to show that the information on which was based the article appearing on the 24th day of May, 1921, in the "Daily Post-Herald," a newspaper printed, published and circulated in the City of Hilo (a copy of which said newspaper is attached to the said motion to withdraw a juror and enter a mistrial), was obtained from one of the attorneys for the plaintiff in said cause.

## V.

That copies of the issue of said "Daily Post-Herald" printed, published and circulated as aforesaid on the 24th day of May, 1921, and containing the article relating to the said cause, last hereinabove mentioned and referred to, were on the 24th day of May, 1921, and prior to the rendition of the verdict in the said cause on the 27th day of May, 1921, easily accessible to the members of the jury impanelled and sworn to try the said cause, and that the said article was in fact seen and read by certain of said jurors.

## VI.

For gross misconduct on the part of J. W. Russell and Fred Patterson, attorneys for the plaintiff, during the trial of the said cause and particularly during the cross-examination [56] of Leo L. Sexton, a witness called for the defendant, in that while pretending to read to the said witness certain extracts from a certain surgical work, to wit, Keen's Surgery, J. W. Russell of said firm, with the knowledge of Fred Patterson, deliberately and intentionally misread the said extracts, all of which appears by an extract from the stenographer's notes of evidence taken on the trial of the said cause hereto attached and marked Exhibit —.

THIS MOTION is based on the files, papers, pleadings, exhibits, record, clerk's minutes, stenographer's notes of proceedings and evidence in said court and cause, all of which are by reference hereby made part hereof; and upon the affidavits of E. C. Compton, W. L. Stanley, C. F. Parsons and



R. T. Forrest and George K. Mills, marked Exhibits "A," "B," "C," "D" and "E," respectively.

WHEREFORE defendant prays that the verdict and judgment heretofore entered herein be vacated and set aside, and that a new trial of said cause be granted.

Dated: June 6, 1921.

HOFFSCHLAEGER COMPANY, LIMITED,  
Defendant.

By SMITH, WARREN & STANLEY and  
(Signed) CHARLES F. PARSONS,  
Its Attorneys. [57]

**Exhibit "A."**

**Affidavit of E. C. Compton.**

Territory of Hawaii,  
Fourth Judicial Circuit,—ss.

E. C. Compton, being first duly sworn, on his oath, says: That he is the editor of the "Hilo Daily Tribune," a newspaper printed and published in Hilo, Hawaii, by the Hilo Tribune Publishing Company, Limited; that affiant is personally acquainted with Harold Russell, a reporter on the staff of the "Daily Post-Herald," and also with Fred Patterson, an attorney at law and a member of the firm of Russell & Patterson, Counsel for the plaintiff in the case of Margaret Fraga vs. Hoffschlaeger Company, Limited; that on the morning of Tuesday, May 24th, 1921, between the hours of 9:30 and 10 o'clock, while a jury for the trial of said case was being impanelled, affiant saw the said Harold Russell and the said Fred Patterson in close conversa-



tion together on the upper lanai of the Federal Building adjoining the Court Room; that on the afternoon of said May 24th there appeared on the front page of said "Daily Post-Herald" newspaper an article headed as follows:

**"FOURTEEN-YEAR-OLD HILO GIRL SEEKS  
\$11,500 DAMAGES FROM INSURANCE  
FIRM FOR INJURIES."**

That on the following morning, to wit, May 25th, 1921, affiant left the District Court in company with the said Harold Russell, and on the sidewalk near said District Court, the said Harold Russell informed affiant (as affiant now recalls the conversation) that the attorneys were making trouble over the publication of the said article, but that he, the said Harold Russell, was not concerned about any possible contempt proceedings as he, the said Harold Russell, had obtained the information upon which he had based said article from one of the attorneys in the case.

(Signed) E. C. COMPTON.

Subscribed and sworn to before me this 2d day of June, 1921.

[Seal]

(Signed) R. T. FORREST,

Notary Public, 4th Judicial Circuit, Territory of  
Hawaii. [58]

**Exhibit "B."**

In the Circuit Court of the Fourth Judicial Circuit,  
Territory of Hawaii.

**DAMAGES.**

MARGARET FRAGA, by ALFRED FRAGA,  
Her Guardian ad Litem,

Plaintiff,

vs.

HOFFSCHLAEGER COMPANY, LIMITED,  
Defendant.

**Affidavit of W. L. Stanley.**

City and County of Honolulu,  
Territory of Hawaii,—ss.

W. L. Stanley, being first duly sworn, upon oath  
deposes and says:

That he is a member of the firm of Smith, Warren & Stanley, the attorneys for the defendant in the above-entitled cause; that as such attorney he was present at and conducted in association with C. F. Parsons, Esq., the defense on the trial of the said cause in which the jury returned a verdict for the plaintiff on the 27th day of May, 1921; that since the trial of the said cause and on the 28th day of May, 1921, affiant discovered new and material evidence on the question of the responsibility for the publication of the article relating to the said cause and headed "Fourteen-Year-Old Hilo Girl Seeks \$11,500 Damage from Insurance Firm for Injuries," which appeared in the "Daily Post-

Herald," a newspaper printed, published, and circulated in Hilo, Hawaii, on the 24th day of May, 1921; that said evidence consisted of the statements, in reference to the publication of the [59] said article and of the source from which Howard Russell, a reporter on the said "Daily Post-Herald," obtained the information on which said article was based, contained in the affidavit of one E. C. Compton, attached to the motion for new trial filed in said cause and Marked Exhibit "A"; that affiant first learned that said E. C. Compton had the conversation with said Howard Russell in said affidavit referred to on the afternoon of May 28, 1921, at about the hour of two o'clock P. M.; that affiant, although he used due diligence, was unable during the trial of said cause to find any evidence fixing the responsibility of the publication of said article, other than appears in the affiant's affidavit and counter-affidavit attached to and made part of the defendant's motion to withdraw a juror and enter a mistrial filed in the said cause; that affiant is not acquainted with the said Howard Russell and at no time up to and including the date hereof has had any conversation with him relating to the said cause or to any other matter whatsoever; and that affiant verily believes that if the matters contained in the affidavit of said E. C. Compton above referred to had been known to the Judge presiding at the trial of said cause prior to the rendition of the verdict therein said Judge would have granted the defendant's said motion to withdraw a juror and enter a mistrial.

(Sgd.) W. L. STANLEY.

Subscribed and sworn to before me this 4th day of June, 1921.

[Seal] (Sgd.) ANNA EDMONDS,  
Notary Public, First Judicial Circuit, Territory of  
Hawaii. [60]

**Exhibit "C."**

In the Circuit Court of the Fourth Judicial Circuit,  
Territory of Hawaii.

**DAMAGES.**

MARGARET FRAGA, by ALFRED FRAGA, Her  
Guardian ad Litem,

Plaintiff,

vs.

HOFFSCHLAEGER COMPANY, LIMITED,  
Defendant.

**Affidavit of Charles F. Parsons.**

Territory of Hawaii,  
Fourth Judicial Circuit,—ss.

Charles F. Parsons, being first duly sworn, upon oath deposes and says:

That he is one of the attorneys for the defendant in the above-entitled action; that he has read the article appearing on the first page of the "Daily Post-Herald" newspaper of the issue of May 24th, 1921, and the affidavits of Carl J. Meinke and W. L. Stanley in support of a motion for a mistrial, the counter-affidavit of Harold Russell with respect thereto, together with the affidavit of E. C. Compton in support of a motion for a new trial in the

above-entitled cause, in which last said affidavit the said E. C. Compton deposes that "the said Harold Russell informed affiant (as affiant now recalls the conversation) that the attorneys were making trouble over the publication of the said article, but that he, the said Harold Russell, was not concerned about any possible contempt proceedings as he, the said Harold Russell, had obtained the information upon which he had based [61] said article from one of the attorneys in the case."

Affiant further says that he at no time discussed with the said Harold Russell the said case or any of the facts therein involved and that the said Harold Russell did not obtain from affiant any information upon which said article could have been based.

(Signed) CHARLES F. PARSONS.

Subscribed and sworn to before me this 6th day of June, A. D. 1921.

[Seal]

(Signed) R. T. FORREST,

Notary Public, Fourth Judicial Circuit, Territory of Hawaii. [62]

### **Exhibit "D."**

#### **Affidavit of R. T. Forrest.**

Territory of Hawaii,  
Fourth Judicial Circuit,—ss.

R. T. Forrest, being first duly sworn, on his oath says: That affiant is a notary public in and for the Fourth Judicial Circuit of the Territory of Hawaii; that during the week last past E. A. Namohala, one of the jurors in the case of Mar-



garet Fraga, by her Guardian *ad Litem*, Alfred Fraga, Plaintiff, vs. Hoffschlaeger Company, Limited, Defendant, recently on trial in the Circuit Court of the Fourth Judicial Circuit of the Territory of Hawaii, admitted to affiant that he, the said juror, on the afternoon of Tuesday, May 24th, 1921, saw and read in the "Daily Post-Herald" of said last-named date the article therein headed: "Fourteen-Year-Old Hilo Girl Seeks \$11,500 Damages From Insurance Firm For Injuries"; and affiant further says that, acting at the request of Charles F. Parsons, one of the attorneys for the defendant in the above-entitled action, affiant thereafter, to wit, on the 6th day of June, 1921, presented to the said E. A. Namohala an affidavit in the form hereto attached and marked Exhibit —, and that the said E. A. Namohala, after asking time to confer with his attorney, refused to subscribe or swear to said affidavit, but admitted to affiant that the statements therein made are true.

(Signed) R. T. FORREST.

Subscribed and sworn to before me this 6th day of June, A. D. 1921.

[Seal] (Signed) M. de F. SPINOLA.

Notary Public, Fourth Judicial Circuit, Territory of Hawaii. [63]



**Exhibit "D-1."**

**Affidavit of E. A. Namohala.**

Territory of Hawaii,  
Fourth Judicial Circuit,—ss.

E. A. Namohala, being first duly sworn, on his oath says:

That he was one of the jurors duly impaneled and sworn on the 24th day of May, A. D. 1921, to try the case then pending in the Circuit Court of the 4th Circuit of the Territory of Hawaii, entitled, "Margaret Fraga, by Alfred Fraga, her Guardian *ad Litem*, Plaintiff, vs. Hoffschlaeger Company, Limited, Defendant"; That on the afternoon of said last-named date, while said action was still on trial before said jury, and before the final submission of said case, there appeared in the "Daily Post-Herald" newspaper, in a prominent part of the first page thereof, an article under the following heading in display type, "Fourteen-Year-Old Hilo Girl Seeks \$11,500 Damages From Insurance Firm for Injuries"; that copies of said newspaper on the day of the publication of said article were easily accessible to the members of said jury and said article on said last-named day was seen and read by affiant.

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Subscribed and sworn to before me this — day  
of May, A. D. 1921.

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Notary Public, 4th Judicial Circuit, Territory of  
Hawaii. [64]

**Exhibit "E."****Affidavit of George K. Mills.**

Cross-examination of Witness L. L. SEXTON by  
Mr. RUSSELL.

Q. Is it not a fact that the text-books in describing methods of diagnosis of fractures of the bones, or separations of the epiphyseal, prescribe the X-Ray as one of the methods to be resorted to after certain methods have been applied?

A. No. It is one of the first things used altogether in diagnosing.

Q. You recognize Keene's work?

A. I do.

Q. I believe this your book, it belongs to your officer? A. Yes.

Q. (Mr. Russell reading from book.) Is it right that the order of examination would be first an examination of the general condition, examination for shocks, loss of blood or injury. Inspection of the injured parts, this is done before the X-Ray is taken; is that the order?

A. I don't know that there is any definite order in making examinations of that kind.

Q. If Keene says so, it would be correct, would it not? A. I suppose so.

Q. Now, Doctor, I will show you these plates, and ask you if you recognize those as being the plates taken on the 24th.

Judge STANLEY.—If the Court please, before this question is put, I would like to have the last question put to the witness. Counsel states to witness that this book Keene states that a certain

order should be followed, whereas the page he is reading from says that the order of examination can be varied according to an individual part.

Mr. PATTERSON.—No use to discuss that, it is merely [65] for the jury. The Court has ruled on that.

Territory of Hawaii,  
Fourth Judicial Circuit,—ss.

George K. Mills, being first duly sworn, on his oath says:

That he was the special stenographer sworn to take notes of the testimony and transcribe the same in the case of Margaret Fraga, by Albert Fraga, Her Guardian *ad Litem*, Plaintiff, vs. Hoffschlaeger Company, Limited, Defendant, recently tried in the Circuit Court of the Fourth Judicial Circuit of the Territory of Hawaii; that the foregoing is a true transcript of his stenographic notes taken in said case with reference to the cross-examination of Dr. L. L. Sexton upon the book known as "Keene's Surgery."

(Signed) GEORGE K. MILLS,

Subscribed and sworn to before me this 6th day of June, A. D. 1921.

[Seal] (Signed) R. T. FORREST,  
Notary Public, Fourth Judicial Circuit, Territory of Hawaii.

[Endorsed]: L. No. 791. Doc. 3, pg. 213. Circuit Court Fourth Judicial Circuit, Territory of Hawaii. Margaret Fraga, by Alfred Fraga, Her Guardian *ad Litem*, Plaintiff, vs. Hoffschlaeger

Company, Limited, Defendant. Motion for a New Trial. Filed at 3:15 o'clock P. M. June 6, 1921. (Sgd.) T. J. Ryan, Clerk. C. F. Parsons and Smith, Warren, & Stanley, Attorneys for Defendant. [66]

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In the Circuit Court of the Fourth Judicial Circuit,  
Territory of Hawaii.

**DAMAGES.**

MARGARET FRAGA, by ALFRED FRAGA,  
Her Guardian ad Litem,

Plaintiff,

vs.

HOFFSCHLAEGER COMPANY, LIMITED,  
Defendant.

**Affidavit of Harold Russell.**

Territory of Hawaii,  
County of Hawaii,—ss.

Harold Russell, being first duly sworn, on oath deposes and says:

That he has read the affidavit of E. C. Compton, editor of the "Hilo Tribune" on file in this cause; that the said E. C. Compton, several days after the jury in the above-entitled cause returned a verdict in favor of the plaintiff telephoned to your affiant and asked your affiant when he would be able to see him as he wished to speak to your affiant in regard to a conversation that he, the said E. C. Compton, had had with your affiant during the progress of the Fraga's trial, and in said telephone conversa-

tion informed your affiant that the defendant's attorneys had been after him to sign an affidavit to the effect that your affiant had told him, the said E. C. Compton, that a lawyer, not giving any name, had given said Compton the information that an insurance company was the real defendant in the Fraga's suit. That in said telephone message the said Compton stated to your affiant that he, the said Compton, was not sure your affiant had made such a statement; that he vaguely recalled such a statement and that he, [67] the said Compton, was anxious to refresh his memory with your affiant before signing any affidavit. That your affiant told him over the said telephone that he had never made such a statement to him and that he then and there repeated to and reminded the said Compton that the only statement that your affiant had made in discussing the Fraga's case prior to the return of the verdict, as to the source of affiant's information was as follows:

“Personally I do not think my story in yesterday's paper was a contempt of court, and besides that I had my information from one of the defendants.”

That this statement made by your affiant was made on the morning following the publication of the said article in the “Post-Herald” in discussing the legal effect of said article. That then the said Compton repeated that he was not at all sure of the affiant's statement that an attorney had given him the information and that he did not know whether he should sign the affidavit or not, but that the de-



pendant's attorneys, namely, Judge Parson and Judge Stanley had been after him several times to get him to sign the affidavit. That this ended the telephone conversation and a few minutes later the said Compton walked into the office of the "Post-Herald," where affiant is employed, and a conversation was held between your affiant and the said Compton, in which the same matters were discussed as above set forth and all of said matters were repeated and talked over. And the said Compton further stated that the reason that he, the said Compton, thought that affiant had made to him a statement that he had received his information from an attorney was because he had seen affiant talking to an attorney the day previous to the writing of the article; and said Compton then and there in said conversation asked your affiant if he had any objection to said Compton signing an affidavit to the effect that said Compton and your affiant had engaged [68] in a conversation about the Fraga's case, and further said that he was not sure of the conversation, that your affiant replied that he could not prevent him from signing an affidavit if he so desired but that he, the said Compton, would be making a mistake if he signed an affidavit to the effect that affiant had said that an attorney had given him the information; said Compton further stated that he would rather not sign the affidavit but that if it was a newspaper fight that he, the said Compton, would quite naturally be anxious to stand by his own paper.



At said time said Compton further stated that just before the said Compton had left his own office he had seen Judge Parson and Judge Stanley approaching his office and he knew that they wanted him to sign an affidavit and that he had come out the back way of his, the said Compton's office, and came to see your affiant before meeting them.

Lastly, your affiant says that he never received the said information upon which said story was published in the "Post-Herald" from any attorney in said cause and that he never at any time made the statement to said Compton, or any one else, that he had ever at any time gotten such information from one of the attorneys in said cause.

Further your affiant sayeth not.

(Sgd.) HAROLD RUSSELL.

Subscribed and sworn to before me this 15th day of June, 1921.

[Seal]

FRED PATTERSON,  
Notary Public, Fourth Circuit, Territory of Hawaii. [69]

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In the Circuit Court of the Fourth Judicial Circuit,  
Territory of Hawaii.

DAMAGES.

MARGARET FRAGA, by ALFRED FRAGA,  
Her Guardian ad Litem,

Plaintiff,

vs.

HOFFSCHLAEGGER COMPANY, LIMITED,  
Defendant.

**Affidavit of Charles Eugene Banks.**

Territory of Hawaii,  
County of Hawaii,—ss.

Charles Eugene Banks being first duly sworn, on oath deposes and says: That he is a resident of Hilo, County and Territory of Hawaii, and is employed by the Hawaii Post-Herald, Limited. That he has read the affidavit of Harold Russell, which is herewith attached, and knows the contents thereof; that he was present at the conversation held in the office of the "Daily Post-Herald" between the said Harold Russell and the said E. C. Compton, referred to in said Russell's affidavit, and heard the said conversation and that the said conversation was in substance as stated by the said Russell in his said affidavit.

Further affiant sayeth not.

(Sgd.) CHARLES EUGENE BANKS.

Subscribed and sworn to before me this 23 day of June, 1921.

[Seal] (Signed) FRED PATTERSON,  
Notary Public, Fourth Circuit, Territory of Hawaii. [70]

In the Circuit Court of the Fourth Judicial Circuit,  
Territory of Hawaii.

**DAMAGES.**

MARGARET FRAGA, by ALFRED FRAGA, Her  
Guardian ad Litem,

Plaintiff,

vs.

HOFFSCHLAEGER COMPANY, LIMITED,  
Defendant.

**Affidavit of Frank J. Cody.**

Territory of Hawaii,  
County of Hawaii,—ss.

Frank J. Cody, being first duly sworn, on oath deposes and says: That he is a resident of Hilo, County and Territory of Hawaii, and is the managing editor of the "Daily Post-Herald," a newspaper published in said Hilo. That he has read the affidavit of Harold Russell, which is attached herewith, and knows the contents thereof; that he was present at the conversation held in the office of the "Daily Post-Herald" between the said Harold Russell and the said E. C. Compton, referred to in said Russell's affidavit, and heard the said conversation and that the said conversation was in substance as stated by the said Russell in his said affidavit.

Further affiant sayeth not.

(Signed) FRANK J. CODY.

Subscribed and sworn to before me this 14th day of June, 1921.

[Seal] (Signed) FRED PATTERSON,  
Notary Public, Fourth Circuit, Territory of Hawaii.

[Endorsed]: L. No. 791. Doc. 3, pg. 213. In the Circuit Court of the Fourth Judicial Circuit, Territory of Hawaii. Margaret Fraga, by Alfred Fraga, Her Guardian *ad Litem*, Plaintiff, vs. Hoffschlaeger Co., Limited, Defendant. Damages. Affidavit of Harold Russell, Eugene Bank and Frank J. Cody. Filed at 3:45 o'clock P. M., Sept. 27, 1921. (Signed) Bernard H. Kelekolio, Asst. Clerk. [71]

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In the Circuit Court of the Fourth Judicial Circuit,  
Territory of Hawaii.

January, 1921, Term.

**DAMAGES.**

MARGARET FRAGA, by ALFRED FRAGA, Her  
Guardian *ad Litem*,

Plaintiff,

vs.

HOFFSCHLAEGER COMPANY, LIMITED,  
Defendant.

**Ruling on Motion for New Trial.**

The defendant has included several grounds in his motion for a new trial, relying on all except VI, and presenting argument on two in particular, and which two will be considered.

The ground first presented is: "That the Court erred in overruling and denying the defendant's motion to withdraw a juror and to enter a mistrial of the said cause; said motion having been filed by the defendant on, to wit, the 25th day of May, 1921."

The motion to withdraw a juror and to enter a mistrial was based on the publication of an article in "The Daily Post-Herald" on the afternoon of the first day of the trial, which article was claimed to be false, misleading and prejudicial.

With defendant's motion for a new trial additional affidavits, and counter-affidavits, bearing on the publication of the said article, were filed. The fact that the newspaper article was read by one of the jurors is shown by the affidavit of R. T. Forrest, and this fact was not shown to the trial court at the time [72] of the decision on the motion to withdraw a juror and to enter a mistrial.

Counsel for defendant admit that during their practice in this territory they have never known of a motion of this character having been presented to a Court, and that the question has not been passed upon our Supreme Court. The fact that the Courts have not been called upon to pass on this question does not necessarily mean that the Courts are lacking in authority to entertain such a motion, or that the procedure would not be proper in this Territory. I think the motion, made at the time it was, was a proper and practical procedure to raise the question; and for a full discussion of the subject



I refer to *Usborne vs. Stephenson*, 48 L. R. A. '432, and the extensive note thereto.

The published article complained of is as follows:

**“FOURTEEN-YEAR-OLD HILO GIRL SEEKS  
\$11,500 DAMAGES FROM INSURANCE  
FIRM FOR INJURIES.**

Pretty Miss Margaret Fraga, fourteen-year-old Hilo school girl, fell down a sidewalk elevator shaft, owned by the Hoffschlaeger Company, Ltd., last August.

When her case was called in the Circuit Court this morning she asked for \$11,500 damages for injuries which she declared she suffered from her fall, from which she declares that she has never entirely recovered.

Shortly before noon, the trial jury was completed and the beginning of testimony will start when the court convene this afternoon.

#### Unusual Circumstances.

The circumstances surrounding the case are rather unusual. According to the Insurance Company, which is defending the case for the defendant, it is admitted that Miss Fraga was walking along Keawe Street and fell down the elevator shaft but they declare that the complainant did not suffer serious injuries. It is reported that the Insurance Company, at the time of the accident, agreed to settle for a small amount of damages. It is admitted that half of the iron grating, which was supposed to cover the shaft, was left unguarded.

Miss Fraga declares that her injuries, both physical and mental, were so serious that she has not



entirely recovered. The twelve men who were selected to hear the evidence in the case are as follows: James Davis, George H. Akau, John Kahiawi, Antone J. Kimi, James Kauhulapua, Charles Johnson, T. O. Mitchell, E. B. Hamauku, A. Arasuda, S. K. Maka, E. A. Namohala, and Harry Hapai. [73]

### Questions Jurisdiction.

Judge William L. Stanley and Charles F. Parsons are appearing for the Insurance Company, who are shouldering the responsibility for the Hoffschlaeger Company. It is expected that this case will require two days.

Yesterday when the case was first called, Judge W. L. Stanley filed a motion that Judge Thompson had no jurisdiction to hear this case. The motion was overruled and the case continued until this morning.

While it is obviously improper for jurors engaged in a case to read newspaper account of the progress of the trial, yet it is well settled that the mere reading of a newspaper account of a trial does not necessarily call for the granting of a new trial, if the article contained nothing of an unfair or prejudicial character and gave no intimation to the jury of the effect of any evidence, or the weight given to it by the public. If it appears, however, that the tendency of the articles read by the jury was injurious to a party the verdict should be set aside by the Court and a new trial granted. 20 R. C. L. 254, citing *Capps vs. State*, 109 Ark. 193,

159, S. W. 193, Ann. Cas. 1915C, 957 and note, 46 L. R. A. 741 and note.

Taking the above citation as a correct statement of the law, I am unable to say that the published article was of such a nature, or contained statements which were of a prejudicial character and gave effect or weight to any evidence and that the jury was in any manner influenced by the said article, even though one of the jurors read it. Particular stress by the defendant is placed on that portion of the article which states that an insurance company is defending the case for the defendant, and that the insurance company at the time of the accident agreed to settle for a small amount of damages. Newspapers should be very careful as to what they publish during a trial, and in my opinion the above statements should not have been published while the trial was going on, yet if the law permitted a new trial for everything a newspaper might publish, that is everything and anything that a party might conceive to be prejudicial, the courts would be busy granting new trials, or a statute would have to be enacted prohibiting the press from making any [74] comment whatever on proceedings in court. I cannot see where the article as published is so prejudicial as to justify, require or permit the withdrawal of a juror under the motion, or now, on that ground to grant a new trial.

The other ground of defendant's motion for a new trial is:

(C) "That the Court erred in refusing to allow defendant to cross-examine one V. E. M. Osorio,

a witness called for the plaintiff, as to the contents of certain medical and surgical authorities, works and books of reference mentioned and referred to by the said witness in supporting his testimony in the course of his cross-examination, and in refusing to order that the said authorities, works and books of reference be produced in court that the witness might be cross-examined thereon and the testimony in relation thereto, and in refusing to allow the defendant to cross-examine the said witness as to the contents of certain medical and surgical authorities, works and books of reference mentioned and referred to by the said witness as supporting his testimony in the course of his redirect examination.”

The situation is shown by the defendant's motion requesting the Court to instruct the witness to produce in court the books and authorities, to wit: “I renew my motion, stating as grounds therefor, that I wish at this time, while the witness is on the stand, to have him read the extracts from those books, which cite as authorities for his statements that the injury known as a separation of the epiphysis of the tubercle does not usually heal until the tubercle becomes bone, and is united to the shaft of the leg or tibia until from the twentieth to the twenty-fifth year.”

The books and authorities which had been referred to by Dr. Osorio on his cross-examination were Sajous, Cunningham, Rose and Carton, and De Costa. These books were not in court, [75] but were at the doctor's home or office in Hilo.

The question above raised involves only the ruling of the Court in refusing to direct the witness to produce in court the said books. There is no evidence in the record to show whether the named authorities support the Doctor or not, and it is not necessary to speculate on what the books might have shown, or what use might have been made of them had the Court ordered them produced. The witness offered to make the books available to the defendant at any time, and Senator Russell on behalf of plaintiff had it entered on the record: "that counsel may recall the witness if he wants him at any time and ask him what he wishes"; and this offer was made immediately after the Court refused to order the production of the books. If we assume that the Court had the power to order the production of the books, yet the reception of evidence is largely in the discretion of the Trial Court, and as the way has been left open by the plaintiff and the Court for defendant to examine the books, recall the witness if so desired, and make such use of the books as defendant might wish, this Court, assuming the power existed in the Trial Court, finds that there was no abuse of discretion in refusing to order the production of the said books.

Later (transcript, pages 118 and 119), Dr. Osorio on redirect was asked, "Doctor, you spoke of authorities, mentioning Sajous, Cunningham, De Costa, etc., upon the proposition that if the healing of an injury such as plaintiff has suffered would not be effected from three of five weeks, that you



cannot expect a recovery until after some years; will ask you as to whether you know that Keene is also an authority upon that." Answer: "Yes, sir." Volume II of Keene was in Court, and upon this being handed to the witness, he was then asked: "Will you see if you can find [76] anything,"—at which point the trial judge said: "Cannot do that on redirect examination." The plaintiff then concluded his redirect examination. Thereupon the defendant asked: "Q. You have stated, Doctor, that Keene's works support your statement that if healing is not effected within three or four weeks, you cannot effect a recovery for some years." "A. It was another authority I cited." "Q. You have cited Keene's works on surgery as being an authority for the proposition that if the healing of an injury, such as you say plaintiff suffered on August 20th, was not effected within three to four weeks it would not heal for years. Will you please turn to the passage in Keene to which you have reference?"

The Court on its own motion refused to permit plaintiff on redirect to go into the question of what Keene held on the subject under consideration, and counsel for defendant sought to override the Court's ruling by inquiring into the same matter. In this ruling there was no error on the part of the Court.

In concluding this part, it appears to the Court that if the works in question did not corroborate the witness, the defendant had ample opportunity at a subsequent time during the trial to have so

shown, and that not having offered to so show the defendant cannot now complain. The motion for a new trial is denied.

Hilo, Hawaii, T. H., November 16, 1921.

[Seal] (Signed) HOMER L. ROSS,  
Judge of the Circuit Court of the Fourth Judicial  
Circuit.

[Endorsed]: Original. L. No. 791. Doc. 3, pg. 213. In the Circuit Court of the Fourth Judicial Circuit, Territory of Hawaii. Margaret Fraga, by Alfred Fraga, Her Guardian *ad Litem*, Plaintiff, vs. Hoffschlaeger Company, Ltd., Defendant. Ruling on Motion for New Trial. Filed at 9:50 o'clock A. M., Nov. 12th, 1921. Bernard H. Kelekolio, Asst. Clerk. [77]

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In the Circuit Court of the Fourth Judicial Circuit,  
Territory of Hawaii.

DAMAGES.

MARGARET FRAGA, by ALFRED FRAGA,  
Her Guardian *ad Litem*,

Plaintiff,

vs.

HOFFSCHLAEGER COMPANY, LIMITED,  
Defendant.

**Order Overruling a Motion for New Trial.**

In the above-entitled cause the defendant's motion for a new trial having come regularly on to be heard and the motion having been argued by the



counsel for the respective parties thereto and the motion having been submitted to this Court for its decision and after being fully advised in the premises, the Court having made, entered and filed its decision in writing herein overruling and denying the said motion for a new trial and now being fully advised in the premises:

NOW, THEREFORE, it is hereby ordered and decreed that the defendant's motion for a new trial be and the same is hereby denied.

(Sgd.) HOMER L. ROSS,  
Judge, Circuit Court, 4th Judicial Circuit, Territory of Hawaii.

Dated, November 18, 1921.

Hilo, Hawaii, November 19, 1921.

Defendant excepts to the foregoing order.

(Sgd.) CHARLES F. PARSONS,  
As Counsel for Defendant.

Allowed:

(Sgd.) HOMER L. ROSS,  
Judge.

[Seal] Attest: (Sgd.) A. K. AONA,  
Clerk of said Court.

[Endorsed]: In the Circuit Court of the Fourth Judicial Circuit, Territory of Hawaii. Margaret Fraga, by Alfred Fraga, Her Guardian *ad Litem*, Plaintiff, vs. Hoffschlaeger Company, Limited, Defendant. Order Overruling a Motion for New Trial. [78]

In the Circuit Court of the Fourth Judicial Circuit,  
Territory of Hawaii.

MARGARET FRAGA, by ALFRED FRAGA,  
Her Guardian ad Litem,  
Plaintiff,

vs.

HOFFSCHLAEGER COMPANY, LIMITED,  
Defendant.

**Exception to Ruling Denying Defendant's Motion  
For a New Trial.**

BE IT REMEMBERED, That heretofore, to wit, on the 27th day of May, 1921, the jury impanelled and sworn in the above-entitled cause returned a verdict therein in favor of the plaintiff and against the defendant in the sum of Seven Thousand Two Hundred and Fifty (\$7,250.00) Dollars, upon which said verdict, and in conformity therewith, judgment was entered in said cause on the 31st day of May, 1921; that thereafter, to wit, on the 6th day of June, 1921, within ten days from and after the said verdict defendant filed in due form in said court and cause, its motion for a new trial, supported by a good and sufficient bond (thereafter approved by the Judge of said Court), in the sum of Seven Thousand Five Hundred (\$7,500.00) Dollars, conditioned for the payment of all costs of the motion in case it is not sustained, and that the moving party will not, to the detriment of the opposite party, remove or otherwise dispose of any property it may have, liable to execution; that

thereafter, to wit, on the 7th day of November, 1921, said motion for a new trial was duly presented, argued and submitted by counsel for plaintiff and defendant; that thereafter, to wit, on the 17th day of November, 1921, the Judge of said court filed in said cause a ruling denying said motion for a new trial, to which last-named ruling defendant, within the time allowed by [79] law, excepted, and does hereby except.

Dated, Hilo, Hawaii, November 17, 1921.

SMITH, WARREN & STANLEY.

By (Sgd.) CHARLES F. PARSONS.

And (Sgd.) CHARLES F. PARSONS,

As Attorneys for Hoffschlaeger Co., Ltd., Defendant and Movant.

The foregoing exception being conformable to the truth and having been duly presented to said Court for allowance on this 18th day of November, 1921, within the time provided by law, is hereby allowed.

Dated: Hilo, Hawaii, November 18th, 1921.

[Seal] (Sgd.) HOMER L. ROSS,  
Judge of Said Court.

[Endorsed]: L. No. 791. Doc. 3, pg. 213. Circuit Court, Fourth Circuit, Territory of Hawaii. Margaret Fraga, by Alfred Fraga, Her Guardian *ad Litem*, Plaintiff, vs. Hoffschlaeger Company, Limited, Defendant. Damages. Exception to Ruling Denying Defendant's Motion for a New Trial. Filed at 8:30 o'clock A. M. November 18th, 1921. A. K. Aona, Clerk. Smith, Warren & Stan-

ley and Charles F. Parsons, Attorneys for Defendant. [80]

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In the Circuit Court of the Fourth Judicial Circuit, Territory of Hawaii.

DAMAGES.

MARGARET FRAGA, by ALFRED FRAGA,  
Her Guardian ad Litem,

Plaintiff,

vs.

HOFFSCHLAEGER CO., LIMITED,

Defendant.

**Plaintiff's Requested Instructions.**

The plaintiff in the above-entitled case respectfully requests the Court to give the following instructions to the jury.

Dated: Hilo, Hawaii, May —, 1921.

(Sgd.) RUSSELL & PATTERSON,

Attorneys for Plaintiff. [81]

INSTRUCTION NUMBER 1.

You are instructed that you are the sole judges of the facts in this case and if you find that the defendant, Hoffschlaeger Co., Ltd., or its agents or servants were negligent in allowing the sidewalk elevator, which has been referred to in the evidence to be opened, and such negligence was the proximate cause of the accident in which the plaintiff was injured and that the plaintiff was not guilty of contributory negligence, that then it is

your duty to find for the plaintiff and against the defendant.

GIVEN.

INSTRUCTION NUMBER 2.

You are instructed that negligence is the failure to observe, for the protection of the interests of others, that degree of care, precaution, and vigilance which the circumstances justly demand, whereby another person suffers injury.

Blashfield, 5542.

GIVEN.

INSTRUCTION NUMBER 3.

You are instructed that the negligence of the defendant's agents and employees is chargeable to their principal, the defendant, and if you find from the evidence that some person who was in the employ of the defendant and in the course of his employment acted in a negligent manner, such negligence is chargeable to the defendant.

GIVEN.

INSTRUCTION NUMBER 4.

You are also charged that it is not the law that a person passing along a sidewalk in a city, who has no knowledge of any defects therein, is required to be constantly watching for holes in, or for obstructions upon, the walk, but he has the right to assume that the walk is in a reasonably safe condition and to act upon that assumption.

GIVEN. [82]

INSTRUCTION NUMBER 5.

You are instructed that in the use of the elevator shaft in question the defendant was bound



under the law to the exercise of reasonable care and diligence for the safety of such persons as had occasion to use the sidewalk over said shaft, and it is for you to determine whether in this case the defendant used due diligence to protect the traveling public against falling into this open shaft. And upon the question as to whether defendant exercised reasonable care and prudence in this respect, you may consider the location of this shaft, whether the defendant could expect persons using the sidewalk while the shaft was open, whether or not defendant should have guarded or protected the opening so that persons passing along would not be likely to fall into it, and if so, whether defendant did so properly guard and protect said opening, and you may consider such other circumstances to be found in the evidence as will have a direct bearing upon this question.

GIVEN.

#### INSTRUCTION NUMBER 6.

You are instructed that while the plaintiff was bound to use care for her own safety in walking along the sidewalk, the care required of her was not the highest degree of care or prudence, nor was it that degree of care that an unusually cautious man or a man of extraordinary prudence would have exercised, but the degree of care expected of the plaintiff was that which an ordinarily prudent person would have exercised under similar circumstances. And in this connection you are charged that the fact merely that plaintiff's attention was



diverted at the time of the injury does not establish contributory negligence as a matter of law.

19 Am. E. An. Cas. 471.

GIVEN. [83]

#### INSTRUCTION NUMBER 7.

Upon the question as to whether or not plaintiff was guilty of contributory negligence in failing to observe the opening into which she fell, you may consider the location of this shaft, the extent to which it covered the sidewalk, whether or not the sidewalk was on a business street, whether or not she acted reasonably in diverting her attention, if her attention was diverted, her age, and such other facts to be found in the evidence bearing upon this issue, and all in the light of the fact that she had a right to assume that the sidewalk was in a reasonably safe condition.

GIVEN.

#### INSTRUCTION NUMBER 8.

You are further instructed that the mere fact that plaintiff knew of the existence of this elevator shaft and failed to avoid it or failed to look for it in passing to determine whether or not it was open at the time does not render her guilty of contributory negligence as a matter of law and will not as a matter of law preclude her from recovering.

GIVEN.

#### INSTRUCTION NUMBER 9.

You are also instructed that the plaintiff in this case has asked for the sum of \$11,500.00 damages and if you find for the plaintiff, I charge you that in

arriving at a verdict you shall assess the damages in such amount as you shall find she is entitled to under the evidence of the case and the instructions heretofore given you by the Court, but in no case shall you find for the plaintiff in excess of \$11,500.00.

GIVEN.

#### INSTRUCTION NUMBER 10.

The Court further instructs the jury that she (the plaintiff) sued for pain and suffering, which she claims to have sustained. Now, that comes under the general head of pain and suffering. There is no mathematical measure given by law [84] for this. You will ascertain from the evidence, if defendant is liable, how much pain and suffering, mentally and bodily, has been undergone by plaintiff, and how much she will undergo, if the evidence discloses it. Then you will find for her what you, as impartial jurors, would find from the evidence to be fairly compensatory to her, but in no event in a sum in excess of the amount of \$11,500.

GIVEN.

#### INSTRUCTION NUMBER 11.

You are instructed that it is the duty of a person injured through the negligence of another to use ordinary and reasonable care in securing medical or surgical aid after receiving such injury. And if you find from the evidence that a physician and surgeon was employed to treat the plaintiff after the said injury and that his instructions in

the treatment of her said injuries were followed and that the plaintiff acted with reasonable care in the treatment of her said injuries, that this is all that the law requires. The law does not impose the exercise of the best judgment in the matter, and if the judgment exercised was what an ordinary and careful person would have done under the circumstances, that is all the law requires.

GIVEN.

#### INSTRUCTION NUMBER 12.

You are further instructed that when you retire to the jury-room that you shall first arrive at a conclusion as to whether or not from the evidence and the law as given you at this time by the Court, the plaintiff is entitled to recover. If you arrive at the conclusion that the plaintiff is entitled to recover damages from the defendant then you shall give her such damages as you decide under the law and the evidence will compensate her for the injuries she received and the pain and anguish which she has suffered by reason of such injuries. [85]

GIVEN.

#### INSTRUCTION NUMBER 13.

You are further instructed that you have no right to disregard the proper arguments of counsel.

While you should not be influenced by anything but the testimony in this case, and the law as given you by the Court, still in the consideration of such evidence and the law you must consider whatever proper light may have been reflected thereon by the arguments and analysis of counsel.

WITHDRAWN.

[Endorsed]: L. No. 719. Doc. 3, pg. 213. In the Circuit Court of the Fourth Judicial Circuit, Territory of Hawaii. Margaret Fraga, by Alfred Fraga, Her Guardian *ad Litem*, Plaintiff, vs. Hoffschlaeger Company, Ltd., Defendant. Damages. Plaintiff's Requested Instructions. Filed at 11 o'clock A. M., May 27, 1921. (Sgd.) T. J. Ryan, Clerk. [86]

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In the Circuit Court of the Fourth Judicial Circuit,  
Territory of Hawaii.

DAMAGES.

MARGARET FRAGA, by ALFRED FRAGA,  
Her Guardian ad Litem,

Plaintiff,

vs.

HOFFSCHLAEGER CO., LIMITED,

Defendant.

**Defendant's Request for Instructions.**

Hoffschlaeger Co., Limited, defendant in the above-entitled action, requests that the following appended instructions be given to the jury empanelled for the trial of said action.

Dated: Hilo, Hawaii, May 26th, 1921.

(Sg.) SMITH, WARREN & STANLEY and  
CHARLES F. PARSONS,

Attorneys for Defendant. [87]

INSTRUCTION No. 3.

I instruct you, Gentlemen of the Jury, if you find from the evidence in this cause that the plain-

tiff in passing along the sidewalk in question did not exercise such care as her capacity and intelligence would enable her to use naturally and reasonably, and that such want of care on her part directly contributed to her injuries, or that if she had exercised such care the accident would not have happened, then she cannot recover in this action and your verdict must be for the defendant.

GIVEN. [88]

INSTRUCTION No. 4.

I instruct you, Gentlemen of the Jury, that the law requires of the plaintiff that she should have exercised such care and prudence in passing along the sidewalk in question as a person of like age, intelligence and capacity might be reasonably expected to naturally and ordinarily use under like circumstances, and that you cannot find for the plaintiff unless you believe from the evidence that at the time she was injured she was exercising such care and prudence; if you believe from the evidence that she was not at the time of the accident using such care and prudence your verdict must be for the defendant.

GIVEN.

INSTRUCTION No. 5.

I instruct you, Gentlemen of the Jury, that it is the duty of all persons traveling over the sidewalks of the city to use their eyes and other senses to avoid defects which are obvious or could be discovered by the exercise of ordinary care on their part, and if you believe from the evidence that the plain-



tiff by the exercising of such care as might reasonably be expected from one of like age, intelligence and capacity could have avoided falling down the defendant's elevator then your verdict must be for the defendant.

Wright vs. Kansas City, 187 Mo. 678, 86 S. W. 452.

GIVEN. [89]

#### INSTRUCTION No. 6.

I instruct you, Gentlemen of the Jury, that future consequences which are reasonably expected to follow an injury may be given in evidence for the purpose of enhancing the damages to be awarded; but to entitle such apprehended consequences to be considered by the jury they must be such as in the ordinary course of nature are reasonably certain to ensue. Consequences which are contingent, speculative or merely possible are not to be considered in ascertaining the damages. It is not enough that the injuries received may develop into more serious conditions than those which are visible at the time of the injury, nor even that they are likely to so develop. To entitle a plaintiff to recover present damages for apprehended future consequences there must be such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury.

Strohm vs. N. Y. & C. R. R. Co., 96 N. Y. 305.

GIVEN.

#### INSTRUCTION No. 7.

I instruct you, Gentlemen of the Jury, that to justify a recovery for future consequences the evi-



dence must show with reasonable certainty that such consequences will follow. The fact that in the minds of the jurors the disability indicated may follow or will probably follow as a result of the injury will not warrant a verdict for damages.

Cordinier vs. Los Angeles Tract Co., 5 Cal.  
A 400, 91 Pac. 436.

GIVEN. [90]

INSTRUCTION No. 8.

I instruct you, Gentlemen of the Jury, that it is the duty of the person injured to lessen the damages as far as possible by the use of ordinary care and diligence, and to submit to and follow all reasonable instructions of a physician, and if you believe from the evidence that the plaintiff unreasonably refused to submit to the treatment of her physician or unreasonably refused to follow his instructions in regard to her injuries, and negligently used and walked upon her injured leg and thereby prevented and delayed recovery from her injury, and that in consequence of her refusal to follow the instructions of her physician her injury was aggravated and increased, then she cannot recover to the extent her conduct resulted in damage to her and which might have been avoided and prevented by submitting to and following the directions of her physician.

Roanoke vs. Electric Company, 68 S. E. 998.

GIVEN.

INSTRUCTION No. 9.

I instruct you, Gentlemen of the Jury, that the defendant is entitled to the legal assumption that the plaintiff was a person of ordinary intelligence

and capable of observing whatever might reasonably be apparent and therefore you have every right to believe that the plaintiff while passing along the sidewalk in question would observe that the defendant's elevator was open. I instruct you further that if it is clear from the evidence that the plaintiff would not have been injured if she had not stepped into the open shaft or if she had paid ordinary attention to what was obvious, and I further instruct you that if the plaintiff was guilty of such contributory negligence that her claim in this suit is barred thereby and that your verdict must be for the defendant.

WITHDRAWN. [91]

INSTRUCTION No. 10.

I instruct you, Gentlemen of the Jury, that before the plaintiff can recover anything in this case it is necessary for her first to show to your satisfaction by a preponderance of the evidence not only that the defendant was negligent as claimed, but also that she was herself free from any negligence which contributed to the injury. If you feel that the plaintiff has failed to show any of these things, or even if you feel that the evidence is evenly balanced, then I instruct you that your verdict must be for the defendant.

GIVEN.

INSTRUCTION No. 11.

I instruct you that in this case the defendant relies upon the defense of contributory negligence on the part of the plaintiff as well as denying that it was itself negligent. Contributory negligence is

such negligence on the part of the plaintiff herself as helped to bring about the accident and without which negligence on her part the accident would not have happened.

GIVEN.

DEFENDANT'S REQUEST FOR INSTRUCTION No. ~~13~~ 12.

The jury are instructed that where a person becomes injured through the fault of another, it is the duty of the person receiving the injury to use reasonable means or care to protect herself against any aggravation of the injury and to do all things reasonably necessary to cure said injury; and if the jury believed, from the evidence in this case, that any injury received by Margaret Fraga in falling down the elevator shaft of Hoffschlaeger Company, Limited, as averred in plaintiff's complaint, continued without improvement or without sufficient improvement, from the date thereof, because of the said Margaret's neglect thereof, because of [92] her failure to obey the reasonable instructions of her physician with respect thereto, or because of improper care thereof by her said physician, which continued injury the said Margaret Fraga could have prevented by the use of reasonable precautions and attention in caring for said injury, then, and in the event above named, the liability of the defendant must be confined to such sum in damages as would justly compensate the said Margaret Fraga for the injury received in said fall and the consequences that would naturally or probably result if

such injury had received reasonable attention and the said Margaret Fraga had used ordinary care to effect a cure thereof.

GIVEN. [93]

INSTRUCTION No. 44 (13).

I instruct you, Gentlemen of the Jury, that in case you find for the plaintiff your next duty will be to determine the amount of damages to which she is entitled. In determining the amount of damages you have a right to and should take into consideration all of the facts and circumstances as proved by the evidence, the nature and extent of the plaintiff's physical injuries and her sufferings in mind and body, if any, resulting from such physical injuries, and may find for her such sum as in your judgment, under the evidence and instructions of the Court, will be a fair and reasonable compensation for the injuries she has sustained or will sustain, if any. You are not authorized arbitrarily to enrich one party at the expense of the other nor should you act unreasonably, or through mere caprice, but should be actuated by and exercise your common sense and from a desire to do right fix such an amount as you believe will thoroughly compensate the plaintiff for the injuries received.

Davis vs. Central Railroad Company, 6 Ga. 329.

GIVEN. [94]

DEFENDANT'S REQUEST FOR INSTRUCTION No. 45 (14).

Gentlemen of the Jury: If you find for the plaintiff herein, then it would be necessary for you to assess damages against the defendant for the in-

jury which you find the plaintiff has suffered because of the negligence of the defendant without contributory negligence as herein defined on the part of the plaintiff.

In the event last above named the amount found by you should be justifiable upon some legal hypothesis presented by the evidence and should not be found solely upon an attempted compromise among yourselves.

In this connection you are instructed that a "quotient verdict," that is, a verdict founded upon an agreement in advance that each juror shall write or name a certain amount, the sum of which amounts should be divided by twelve, or any other sum, and that the quotient thus obtained shall be the amount of damages returned is illegal.

GIVEN. [95]

#### INSTRUCTION No. 15.

I instruct you, Gentlemen of the Jury, that speculative, contingent and uncertain damages are not recoverable by the plaintiff, and, if you find for the plaintiff such damages should not be considered by you in arriving at the amount of damages to be included in your verdict.

GIVEN.

[Endorsed]: Circuit Court, Fourth Judicial Circuit, Territory of Hawaii. L. No. 791, Doc. 3, pg. 213. Margaret Fraga, by Alfred Fraga, Her Guardian *ad Litem*, Plaintiff, vs. Hoffschlaeger Co., Limited, Defendant. Damages. Defendant's Request for Instructions. Filed at 11:05 o'clock A. M. May 27, 1921. (Signed) T. J. Ryan, Clerk. Smith,



Warren & Stanley, Attorneys, Honolulu, T. H.  
[96]

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In the Circuit Court of the Fourth Circuit, Territory of Hawaii.

January, A. D. 1921, Term.

Monday, May 23, 1921.

Present: Honorable J. W. THOMPSON, Judge,  
Presiding.

THOMAS PEDRO, Jr., Asst. Clerk and  
Stenographer.

Court opened by Police Officer Joseph Higgins at  
ten o'clock A. M.

L. No. 791—DAMAGES.

MARGARET FRAGA, by ALFRED FRAGA, Her  
Guardian ad Litem,

Plaintiff,

vs.

HOFFSCHLAEGER COMPANY, LTD.,  
Defendant.

**Minutes of Court—May 23, 1921—Trial.**

J. W. Russell and Fred Patterson appearing as  
attorneys for the plaintiff.

W. L. Stanley, Esq., of the firm of Smith, Warren & Stanley, appearing as attorneys for the defendant.

The Court inquires if the attorneys for the plaintiff are ready.



Mr. Stanley announces to the Court that before answering he would like to make a special appearance in this cause and to suggest by way of a written suggestion which he will file later as to the disqualification of the Honorable J. W. Thompson to make any order in this case and to preside over this case. [97]

Mr. Stanley reads the said suggestion, which is as follows:

In the Circuit Court of the Fourth Circuit, Territory of Hawaii.

MARGARET FRAGA, by ALFRED FRAGA, Her  
Guardian ad Litem,

Plaintiff,

vs.

HOFFSCHLAEGER CO., LIMITED,

Defendant.

SUGGESTION OF DISQUALIFICATION OF  
THE HONORABLE J. W. THOMPSON, AS  
JUDGE IN THIS CAUSE.

Comes now the defendant Hoffschlaeger Company, Limited, and specially appear herein, by its attorneys Messrs. Smith, Warren & Stanley, and suggests the disqualification of the Honorable J. W. Thompson, Judge of the Circuit Court of the Third Judicial Circuit of the Territory of Hawaii to preside at the trial of the above-entitled cause or enter any order or judgment therein for the reasons following, to wit:

That the term of the Honorable Clement K. Quinn as Judge of the said Fourth Circuit Court expired on the 4th day of March, A. D. 1921, and since said last-named date there has been no qualified Judge of said Fourth Circuit Court.

That the request of the Chief Justice and/or the Supreme Court of the Territory of Hawaii that the said Honorable J. W. Thompson act temporarily as Judge of the Fourth Circuit Court of said Territory is illegal and not authorized by statute and the said Chief Justice and/or the Supreme Court had no jurisdiction to make said request or to authorize the said Honorable J. W. Thompson to act as said Judge.

May 23, 1921.

HOFFSCHLAEGER COMPANY, LIMITED,

By (Sgd.) SMITH, WARREN & STANLEY,

Its Attorneys. [98]

The Court overrules the suggestion.

Mr. Stanley excepts to the ruling of the Court.  
Exception allowed.

The Court inquires of Mr. Stanley if he is ready for trial and Mr. Stanley answers in the negative.

Mr. Stanley then asks that this case stand over until to-morrow morning for the reason that he is not ready, he having just arrived yesterday.

The Court announces that before it passes on the request just made, it would like to ask a question on another matter. The Court then inquires if the respective parties in the criminal case set for trial to-day are ready to proceed, and Messrs. Beers

& Desha, Jr., respectively representing the prosecution and the defendant answer in the affirmative.

Mr. Russell consents to the request made by Mr. Stanley for a continuance.

The Court grants the motion of Mr. Stanley and continues the case until to-morrow morning at the hour of nine o'clock.

Minutes of May 23, 1921.

Approved:

(Sgd.) J. W. THOMPSON,  
Acting Judge of the Circuit Court of the Fourth  
Judicial Circuit, Territory of Hawaii. [99]

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In the Circuit Court of the Fourth Judicial Circuit,  
Territory of Hawaii.

January, A. D. 1921, Term.

Tuesday, May 24th, 1921.

Present: Honorable J. W. THOMPSON, Judge,  
Presiding.

THOMAS PEDRO, Jr., Stenographer  
and Asst. Clerk.

L. No. 791—DAMAGES.

MARGARET FRAGA, by ALFRED FRAGA, Her  
Guardian ad Litem,

Plaintiff,

vs.

HOFFSCHLAEGER COMPANY, LTD.,  
Defendant.

**Minutes of Court—May 24, 1921—Trial Continued).**

Messrs. Russell & Patterson appearing as attorneys for the plaintiff.

Messrs. W. L. Stanley and C. F. Parsons, appearing as attorneys for the defendant.

The Court makes a remark relative to the "Suggestion as to the disqualification of the judge now presiding" and announces that it will now file its decision on said suggestion which the court regards as a motion, which decision overrules said motion.

Mr. Stanley excepts to said decision and the exception is allowed. [100]

The Court announces that Juror Makoto Nakamoto, for several reasons, have requested that he be excused from service for to-day and to-morrow and that the reasons offered being sufficient, the Court then excused the said Makoto Nakamoto.

By order of the Court the clerk calls the roll of trial jurors and the same shows the following present:

John Kaiawe, Ernest G. Malterre, E. A. Namohala, Solomon K. Maka, E. B. Hamouku, Kitaro Ishii, George H. Akau, Antone Nobriga, Charley Johnson, Soichi Mukai, Henry Sternemann, Harry S. Hapai, James Davis, Antone R. Balbino, Samuel B. K. Haina, James Kahauolopua, Antone J. Kimi, W. W. Kuratani, T. O. Mitchell, S. R. Tsuda, and Lawrence B. Willfong.

Mr. Stanley announces that he desires to enter

the name of C. F. Parsons as associate counsel for the defendant.

There being no court reporter present, the Court suggests the name of George K. Mills, who acted as such yesterday, and asks counsel for the respective parties as to whether Mr. Mills is agreeable.

Messrs. Patterson and Parsons announce that Mr. Mills is agreeable to them, respectively.

Upon inquiry it was ascertained that Mr. Mills, owing to pressure of work, could not be procured. The Court so announces and suggests the name of J. W. Bains.

Messrs. Patterson and Parsons again announce that Mr. Bains would be agreeable to them, respectively.

Upon inquiry, it was ascertained that Mr. Bains could not be found in his office and that his whereabouts is not known. The court announces that fact.

Mr. Patterson announces that Mr. Stewart be satisfactory to them.

Mr. Patterson announces that Mr. Stewart is engaged in this case not only as stenographer but to interview witnesses as well. [101]

Mr. Patterson, in view of the statement of Mr. Parsons, objects to Mr. Stewart's acting as Court Reporter in this case.

There being no stenographers available, the court again suggests the name of Mr. Mills and orders the clerk to try and get Mr. Mills to act in this case which will take about two days. Mr.



Mills consents to act as Court Reporter in this case providing the attorneys do not talk very fast as he is not a regular court reporter.

While waiting for the arrival of Mr. Mills, the Court takes up the following case:

\* \* \* \* \*

At 9:45 o'clock Mr. George K. Mills arrives and he is immediately sworn as court reporter in this cause.

The respective parties being ready, the following trial jurors are drawn and sworn on their *voir dire*:

James Davis, Samuel B. K. Haina, Antone R. Balbino, Kitaro Ishii, George H. Akau, James Kahaulopua, E. B. Hamauku, E. A. Namohala, John Kaiawe, Charley Johnson, S. R. Tsuda, Harry S. Hapai.

Mr. Russell makes a brief outline of the case to the jurors and proceeds to examine them on their *voir dire*.

The Court announces to counsel that they must not ask any irrelevant questions as it does not feel justified in sitting and allowing questions to be answered by the jurors merely for the purpose of satisfying any private motives which counsel may have.

Mr. Russell proceeds with the examination of the jurors on their *voir dire*.

The jury is passed for cause by the plaintiff.

Mr. Parsons proceeds to examine the jurors on their *voir dire*.

The jury is passed for cause by the defendant.



## PEREMPTORY CHALLENGES.

On plaintiff's first challenge, the plaintiff peremptorily challenges Kitaro Ishii. Ernest G. Malterre is drawn and sworn on his *voir dire*. He is examined by Mr. Russell and is passed for cause by the plaintiff. Examined by Mr. Parsons and passed for cause by the defendant.

On defendant's first challenge the defendant peremptorily challenges Antone R. Balbino. T. O. Mitchell is drawn and sworn on his *voir dire*. He is examined by Mr. Russell and is passed for cause by the plaintiff. Examined by Mr. Parsons and is passed for cause by the defendant.

On plaintiff's second challenge, the plaintiff peremptorily challenges Ernest G. Malterre. Solomon K. Maka is drawn and sworn on his *voir dire*. He is examined by Mr. Russell and is passed for cause by the plaintiff. Examined by Mr. Parsons and is passed for cause by the defendant.

On defendant's second challenge the defendant peremptorily challenges Samuel B. K. Haina. W. W. Kuratani is drawn and sworn on his *voir dire*. He is examined by Mr. Russell and is passed for cause by the plaintiff. Examined by Mr. Parsons and is passed for cause by the defendant.

On plaintiff's third and last peremptory challenge, Mr. Russell announced that the jury is satisfactory to the plaintiff.

On defendant's third and last challenge the defendant peremptorily challenges W. W. Kuratani. Antone J. Kimi is drawn and sworn on his *voir dire*. He is examined by Mr. Russell and passed

for cause by the plaintiff. Examined by Mr. Parsons and passed for cause by the defendant.

Upon the Court's inquiry the respective parties announce that the jury is satisfactory. Whereupon the following trial jurors are sworn to try the case.  
[103]

James Davis, George H. Akau, John Kaiawe, Antone J. Kimi, James Kahauolopua, Charley Johnson, T. O. Mitchell, E. B. Hamauku, S. R. Tsuda, Solomon K. Maka, E. A. Namohala and Harry S. Hapai.

The remaining trial jurors are excused until Thursday morning, at ten o'clock.

At this time, to wit, 11:49 o'clock the Court continues this cause until 1:30 P. M. to-day and excuses the jurors after they have been admonished not to discuss this cause among themselves nor to allow others to discuss same within their hearing and if anyone attempts to do so, they must report that fact to the Court.

The Court takes a recess until 1:30 P. M., to-day.

#### AFTERNOON SESSION.

L. No. 791—DAMAGES.

MARGARET FRAGA by ALFRED FRAGA, Her  
Guardian ad Litem,

Plaintiff,

vs.

HOFFSCHLAEGER COMPANY, LTD.,

Defendant.

FURTHER TRIAL.

The respective parties being ready, by order of the Court, the clerk calls the roll of the jury and the same shows that all its members are present.

The further trial of the above-entitled cause proceeds.

Mr. Russell makes opening statement to the jury.

H. V. Patten called, sworn and examined as a witness for and on behalf of plaintiff.

Direct examination by Mr. Russell. Mr. Russell shows to the witness a lease by and between the First Bank of Hilo, Ltd., and [104] the defendant company, and offers the same in evidence. No objection.

The COURT.—It may be received in evidence and marked Plaintiff's Exhibit "A."

No cross-examination.

Margaret Fraga, plaintiff, called, sworn and examined as a witness for and on her own behalf.

Direct examination by Mr. Russell.

It is admitted that the defendant is a corporation existing under and by virtue of the laws of the Territory of Hawaii.

Cross-examination by Mr. Stanley.

At this time, to wit, 2:50 P. M., the Court declares a recess of five minutes.

The Court reconvening, the further trial of this cause proceeds. Margaret Fraga, plaintiff, takes the stand. Cross-examination by Mr. Stanley resumes.

Redirect examination by Mr. Russell. Recross-examination by Mr. Stanley.

Alfred G. Souza called, sworn and examined as a witness for the plaintiff.

Direct examination by Mr. Russell.

With the Court's and counsel's permission, Margaret Fraga is recalled and Mr. Stanley examines her as part of his recross-examination.

Alfred G. Souza, witness for the plaintiff, recalled, to the stand.

Direct examination by Mr. Russell proceeds.

Mr. Russell shows to the witness X-ray photographic plates on which there is noted a memorandum "Margaret Fraga" and offers same in evidence. No objection.

The COURT.—It may be received in evidence and marked Plaintiff's Exhibit "B." [105]

Mr. Russell offers in evidence print of plate marked Plaintiff's Exhibit "B." No objection.

The COURT.—It may be received in evidence and marked Plaintiff's Exhibit "C."

Mr. Russell offers in evidence two X-ray photographic plates which have been shown to witness. No objection.

The COURT.—They may be received in evidence and marked Plaintiff's Exhibits "D" and "E," respectively.

Mr. Russell offers in evidence print just shown to witness. No objection.

The COURT.—It may be received in evidence and marked Plaintiff's Exhibit "F."

Mr. Russell offers in evidence another print just shown to witness. No objection.

The COURT.—It may be received in evidence and marked Plaintiff's Exhibit "G."

At 3:36 P. M. Cross-examination by Mr. Stanley.

William G. Souza called, sworn and examined as a witness for the plaintiff.

Direct examination by Mr. Russell. Mr. Russell shows to the witness a photograph and offers the same in evidence. No objection.

The COURT.—It may be received in evidence and marked Plaintiff's Exhibit "H."

Further direct examination by Mr. Russell proceeds.

4:08 P. M. Cross-examination by Mr. Stanley.

With the Court's and counsel's permission, Mr. Russell examines the witness again as part of his direct examination.

Mr. Stanley proceeds with the cross-examination.

4:20 P. M. Redirect examination by Mr. Russell.

4:22 P. M. The Court continues this cause until to-morrow morning at nine o'clock and excuses the jury, after giving them [106] the usual admonition with instructions to the jury that they must not visit the scene of the accident during the intermission, until that time.

Mr. Russell requests that the jury be allowed, some time during the trial, to visit the scene of the accident.

Mr. Stanley announces that there will be no objection.

The Court announces that in the event that the jury visits the scene of the accident, the Court will accompany it.



Mr. Stanley requests that Dr. Osorio have X-ray photographs taken of both knees of Margaret Fraga, defendant, and to have them finished by eight o'clock to-morrow morning.

Mr. Russell announces that there will be no objection.

4:26 P. M. Court adjourned until to-morrow morning at the hour of nine o'clock.

Minutes of May 24, 1921.

Approved.

(Sgd.) J. W. THOMPSON,  
Acting Judge of the Circuit Court of the Fourth  
Judicial Circuit, Territory of Hawaii. [107]

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In the Circuit Court of the Fourth Judicial Circuit,  
Territory of Hawaii.

January Term, A. D. 1921.

Wednesday, May 25, 1921.

Present: Honorable J. W. THOMPSON, Judge  
Presiding.

THOMAS PEDRO, Jr., Asst. Clerk and  
Stenographer.

GEORGE K. MILLS, Special Stenog-  
rapher.

Court opened by Joseph Higgins, Police Officer,  
at nine o'clock A. M.

L. No. 791.—DAMAGES.

MARGARET FRAGA, by ALFRED FRAGA, Her  
Guardian ad Litem,

Plaintiff,

vs.

HOFFSCHLAEGER COMPANY, LTD.,  
Defendant.



**Minutes of Court—May 25, 1921—Trial (Continued).**

Messrs. Russell & Patterson, appearing as attorneys for plaintiff.

Messrs. Stanley & Parsons, appearing as attorneys for defendant.

By order of the Court, the clerk calls the roll of the jury in this cause and the same shows that all of its members are present.

The Court declares a recess of 15 minutes and announces that it wants to see the attorneys in this cause at its chamber.

Recess.

9:20 A. M. The Court reconvenes.

Mr. Stanley announces to the Court that he has a motion to make, a copy of which he has handed to counsel for the plaintiff in this case and that with the court's permission, he will file it later.

No objection. [108]

The COURT.—The motion may be granted.

Mr. Russell announces that the plaintiff stipulates that the motion may be deemed filed and that the plaintiff agrees as part of the motion, that the defendant file such additional stipulations or papers as it may desire.

The COURT.—The motion may be filed and made a part of the record in this case.

The clerk files the said motion.

Counsel for the respective parties announce that they are ready for argument on the motion just filed.

The Court inquires of counsel as to how long the argument on the motion will take.

Mr. Stanley, in reply to the Court, announces that it will take a couple of hours.

Counsel stipulate and agree that the argument on the motion may be made in the Judge's Chambers in the absence of the jury.

The Court announces to the jury that there has been filed a motion in this case which motion has been made a part of the record in this case and that it becomes necessary at this time for the court to hear the argument on said motion.

The Court excuses the jury until 11 o'clock this morning and also excuses Mr. Mills, the court reporter in this case, until that time.

9:27 A. M. Recess.

11:47 A. M. The court reconvenes.

The Court announces to the jury that it is almost 12 o'clock and that although there are several matters coming up at 1 o'clock it will excuse the jury until 1:30 o'clock to-day and will continue this cause until that time.

11:48 A. M. Recess to 1:15 P. M. to-day.

#### AFTERNOON SESSION.

L. No. 791. Margaret Fraga, by Alfred Fraga, Her Guardian *ad Litem*, Plaintiff, vs. Hoffschlaeger Co., Ltd., Defendant—Damages. Further Trial. [109]

The respective parties appearing, and by order of the Court, the clerk calls the roll of the jury and the same shows that all of its members are present.

The Court announces that it is not ready to pass on the motion for reasons well known to the attorneys, and that being among others, that the Court has not yet read the citation of authorities.

Mr. Stanley announces to the court that since the last adjournment he had Dr. Osorio take X-ray plates or rather pictures of each of the legs of the plaintiff, Margaret Fraga, pursuant to agreement by counsel for the plaintiff and himself made yesterday; and that he now desires to present them to counsel for the plaintiff in the presence of the Court.

Dr. V. E. M. Osorio called, sworn and examined as a witness for the plaintiff.

Direct examination by Mr. Russell.

Mr. Russell offers in evidence an X-ray photographic plate bearing number 1014 together with print thereof. No objection.

The COURT.—It may be admitted in evidence and marked Plaintiff's Exhibit "I."

It is admitted that the plate offered is an X-ray photograph, together with the print, of the plaintiff's left leg.

Mr. Russell offers in evidence an X-ray photographic plate bearing number 1015 together with print thereof. No objection.

The COURT.—It may be received in evidence and marked Plaintiff's Exhibit "J".

It is admitted that the print is a photograph of plaintiff's left leg.

Mr. Russell offers in evidence X-ray photographic plates from which were printed photo-

graphs marked Plaintiff's Exhibits "I" and "J." No objection.

The COURT.—It may be admitted in evidence and marked Plaintiff's Exhibit "K." [110]

Mr. Russell offers in evidence photographic print of X-ray plate bearing number 1016, the print being a photograph of plaintiff's right leg. No objection.

The COURT.—It may be admitted in evidence and marked Plaintiff's Exhibit "L".

Mr. Russell offers in evidence photographic print of X-ray plate bearing number 1017, the print being a photograph of plaintiff's right leg. No objection.

The COURT.—It may be received in evidence and marked Plaintiff's Exhibit "M."

Mr. Russell offers in evidence photographic plate from which were developed the prints, Plaintiff's Exhibits "L" and "M." No objection.

The COURT.—It may be received in evidence and marked Plaintiff's Exhibit "N."

It is admitted that the same were taken on the afternoon of May 24th, 1921.

Further direct examination by Mr. Russell proceeds.

With permission of Court and counsel, Mr. Stanley questions the witness.

Direct examination by Mr. Russell proceeds.

Again with permission of Court and counsel, Mr. Stanley questions the witness.

Direct examination by Mr. Russell proceeds.

Mr. Stanley having heretofore objected to the

use of a memorandum by the witness, now withdraws his objection.

Mr. Russell shows to the witness Plaintiff's Exhibits "B" and "C."

It is admitted that the photographs were taken on September 4, 1920.

Mr. Russell shows to the witness Plaintiff's Exhibits "G," "E," "D," "I," "J," "K," "L," "M," "I" and "L."

At this time, to wit, 3 P. M. the Court declares a recess of 5 minutes. [111]

The Court reconvening, Dr. V. E. M. Osorio, witness for the plaintiff, takes the stand.

Direct examination by Mr. Russell proceeds.

3:15 P. M. Cross-examination by Mr. Stanley.

4:36 P. M. Mr. Stanley, announcing to the Court that he will not be able to finish with this witness to-day, requests that this cause be continued until to-morrow morning at the hour of nine o'clock.

Mr. Russell announces that there would not be any objection to the request made by Mr. Stanley.

Whereupon the Court continues this cause until to-morrow morning at the hour of nine o'clock, and having admonished the jurors not to discuss this cause during the intermission among themselves nor allow others to discuss same withing their hearing, the Court excuses the jury until that time.



Court adjourns until to-morrow morning at the hour of nine o'clock.

Minutes of May 25, 1921.

Approved.

(Sgd.) J. W. THOMPSON,  
Acting Judge of the Circuit Court of the Fourth  
Judicial Circuit, Territory of Hawaii. [112]

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In the Circuit Court of the Fourth Judicial Circuit,  
Territory of Hawaii.

January, A. D. 1921, Term.

Thursday, May 26, 1921.

Present: Honorable J. W. THOMPSON, Judge  
Presiding.

THOMAS PEDRO, Jr., Asst. Clerk and  
Stenographer.

GEORGE K. MILLS, Special Stenographer.

Court opened by Police Officer Higgins at the hour of nine o'clock A. M.

L. No. 791—DAMAGES.

MARGARET FRAGA, by ALFRED FRAGA,  
Her Guardian ad Litem,

Plaintiff,

vs.

HOFFSCHLAEGER COMPANY, LTD.,  
Defendant.

**Minutes of Court—May 26, 1921—Trial (Continued).**

Messrs. Russell & Patterson, appearing as attorney for the plaintiff.

Messrs. W. L. Stanley and C. F. Parsons, appearing as attorney for the defendant.

By order of the Court, the clerk calls the roll of trial jurors sitting in the above-entitled cause and also those that have been excused heretofore until this morning at nine o'clock and the same shows the following present:

John Kaiawe, Ernest G. Malterre, E. A. Namohala, Solomon K. Maka, E. B. Hamauku, Kitaro Ishii, George H. Akau, Antone Nobriga, Charley Johnson, Soichi Mukai, Henry Sternemann, Harry S. Hapai, James Davis, Antone R. Balbino, Samuel B. K. Haina, James Kahaulopua, Antone J. Kimi, W. W. Kuritani, T. O. Mitchell, Makoto Nakamoto, S. R. Tsuda, and Lawrence B. Wilfong.

The Court announces that yesterday morning a certain motion was [113] filed in court, to wit, a motion of the defendant for withdrawal of a juror and to enter a mistrial in this cause.

The Court announces further that the Court has gone into the matter with a great deal of care and that after taking into consideration the various matters contained in the motion, the Court is of the opinion that the motion is not well taken. The Court further announces that at a time later it will

file a written opinion in order that the Court's position may be well known.

Mr. Stanley excepts to the decision of the court. Exception allowed.

Dr. V. E. M. Osorio, witness for the plaintiff, takes the stand. 9:05. Cross-examination by Mr. Stanley proceeds.

Mr. Stanley moves that the witness be instructed to produce books of medical authorities as testified to by the witness. The Court takes the matter under advisement.

The Court overrules the motion. Exception. Exception allowed.

The Court inquires of the witness if the books referred to by counsel are available.

The witness replies in the affirmative.

Mr. Stanley renews his motion. The Court again overrules the motion.

Mr. Russell announces that he is willing to note on the record that counsel may recall the witness later on, if he wants to, and that he may refer to the authorities which he has referred to.

Cross-examination by Mr. Stanley proceeds.

Mr. Stanley shows to the witness Plaintiff's Exhibits "F," "D," "G," "B" and proceeds to examine the witness further.

It is admitted that the print which Mr. Stanley now hands to the witness is in truth and in fact a similar print or copy of the print with the name number, 1015, which has been admitted in evidence in this case.

Mr. Stanley proceeds with the cross-examination of the witness.

The Court instructs the witness not to answer a certain question [114] propounded to him.

Mr. Stanley announces to the Court that on the admission of counsel he offers a duplicate of print No. 1015 which has heretofore been introduced in evidence as Plaintiff's Exhibit "J."

Mr. Russell objects to the offer as being incompetent and irrelevant.

The Court rules that this cannot be admitted. Exception. Exception allowed.

Mr. Stanley shows to the witness Plaintiff's Exhibit "J" and proceed with the examination.

10:25 A. M. Recess for five minutes by order of the Court.

The Court before leaving the bench for the recess, announces that Juror W. W. Kuritani has requested that he be excused, and that the court deeming the reasons therefor sufficient, excuses the said juror from day to day.

L. No. 791. The Court reconvening, the trial in L. No. 791 proceeds.

Dr. Osorio, witness for the plaintiff, takes the stand.

Further cross-examination by Mr. Stanley. Mr. Stanley renews his motion that the witness be instructed to procure the books of medical authorities which he has testified to, so that he may have an opportunity to cross-examine the witness.

The Court overrules the motion. Exception. Exception allowed.

The Court questions the witness. Further cross-examination by Mr. Stanley.

The Court instructs the witness not to answer a certain question, and warns Mr. Stanley that he must proceed more rapidly than he has proceeded heretofore.

Mr. Stanley excepts to the remarks of the Court. Exception allowed.

Further cross-examination by Mr. Stanley.

The Court instructs the witness again not to answer a certain question.

Mr. Stanley announces that he will refrain the question is being [115] permitted, proceeds to ask the question. The Court again instructs the witness not to answer the question.

11:24 A. M. Recess, by order of Court for five minutes, as the Court is called to the telephone.

The Court, reconvening, the trial proceeds with Dr. Osorio on the stand.

Cross-examination by Mr. Stanley proceeds.

The Court again instructs the witness not to answer the question.

Mr. Stanley objects and excepts to the action of the Court.

Exception allowed.

Further cross-examination by Mr. Stanley.

The Court again instructs the witness not to answer a certain question.

Mr. Stanley objects and excepts to the action of the Court. Exception allowed.

Mr. Stanley complains of the Court curtailing his examination.



The Court announces that the Court has not curtailed his examination nor will *the* curtail or attempt to curtail examination of counsel, but that the Court desires Counsel to inquire into material facts which are relevant to the issues in this case.

Further cross-examination by Mr. Stanley.

The Court again instructs the witness not to answer a certain question just asked.

Mr. Stanley objects to the action of the Court. Exception allowed.

The Court questions the witness.

Mr. Stanley objects to the question of the Court.

Objection overruled. Exception. Exception allowed. Further cross-examination by Mr. Stanley.

Mr. Stanley renews motion that the Court instruct the witness to procure the books referred to by him. The court again overrules the motion.

Further cross-examination by Mr. Stanley.

11:53 P. M. Redirect examination by Mr. Russell.

With permission of Court and counsel, Mr. Stanley questions the witness again as part of his examination. [116]

Redirect examination by Mr. Russell proceeds.

12:05 P. M. Recross-examination by Mr. Stanley. Mr. Stanley refers to a book labelled and known as "Keen's Surgery."

The Court objects to the reference as being a violation of the rules of evidence.

Exception. Exception allowed. Further recross-examination by Mr. Stanley.

The Court again instructs the witness not to answer the question just asked.

Exception. Exception allowed. Further re-cross-examination by Mr. Stanley.

The Court again instructs the witness not to answer the question just asked.

Exception. Exception allowed.

Mr. Stanley moves to strike out all the evidence given by Dr. Osorio to the effect that the authorities named by him supporting the proposition advanced by him on the ground that the defendant has not been allowed to cross-examine the witness on that statement and to have the books and authorities referred to by the doctor, produced to enable counsel to cross-examine.

The Court overrules the motion.

12:19 P. M. The Court continues this cause until 1:45 P. M., to-day and excuses the jury, after giving the usual admonition, until that time.

The Court takes a recess until 1:45 P. M. today.

#### AFTERNOON SESSION—1:45 P. M.

##### FURTHER TRIAL.

The respective parties being ready, by order of the Court, the clerk calls the roll of the jury and the same shows that all of the members are present.  
[117]

Daniel B. Borden called, sworn and examined as witness for the plaintiff.

1:46 P. M. Direct examination by Mr. Russell.

Mr. Stanley announces that he is willing to admit that it was about twenty seconds that elapsed

before the witness again saw the plaintiff on the day of the accident.

1:50 P. M. Cross-examination by Mr. Stanley.

At this time the Court announces to the clerk that the court sets aside its order *accusing* the jurors not engaged in this case, until to-morrow at the hour of nine o'clock.

The Court orders that the clerk inform those jurors that they are excused until Tuesday, May 31, 1921, at the hour of nine o'clock.

The clerk informs the police to so inform the said jurors.

L. No. 791. Continued.

Further cross-examination by Mr. Stanley.

Margaret Fraga, plaintiff, recalled for the purpose of making a few corrections, as part of the examination in chief.

2:10 P. M. Direct examination by Mr. Russell.

2:14 P. M. Cross-examination by Mr. Stanley.

2:18 P. M. Redirect examination by Mr. Russell. No recross-examination.

Mr. Russell offers in evidence the order of the Court appointing Alfred Fraga as guardian *ad Litem*. No objection.

The COURT.—“It may be received in evidence and marked Plaintiff’s Exhibit ‘O.’

Mr. Russell requests that the jury be permitted to visit the scene of the accident. No objection.

The Court rules that the jury visit the scene of the accident after all the evidence is in, for the reason that if the jury is permitted to go to the

said scene now, there might arise during the presentation of the defendant's case which will necessitate the jury revisiting the said scene, and thereby waste a lot of valuable time. Counsel abide by the ruling of the Court.

2:20 P. M. Plaintiff rests. [118]

Mr. Stanley moves for a nonsuit on the ground that the evidence shows that the plaintiff was guilty of contributory negligence which would bar any recovery in this case.

Mr. Stanley requests that he be allowed an opportunity to argue on the motion.

2:23 P. M. The jury is excused pending the argument on the motion for nonsuit.

In the absence of the jury the Court announces to Mr. Stanley in the presence of counsel for the plaintiff that it cannot sustain the motion.

2:25 P. M. The jury, by order of the Court returns to court.

The Court announces that the motion for a nonsuit is overruled. Exception. Exception allowed.

2:26 P. M. Recess for five minutes by order of the Court.

The Court reconvenes and the trial proceeds. Fuji Yamagita called, sworn and examined as a witness for the defendant.

Direct examination by Mr. Stanley. 2:53 P. M. Cross-examination by Mr. Russell. 2:54 P. M. Daniel B. Borden, witness for plaintiff, called as a witness for the defendant.

Direct examination by Mr. Stanley. 3:00 P. M. Cross-examination by Mr. Russell. 3:02 P. M. Dr.

L. L. Sexton called, sworn and examined as a witness for the defendant.

Direct examination by Mr. Stanley.

Mr. Stanley shows to the witness Plaintiff's Exhibits "B" and "K." 4:40 P. M. Cross-examination by Mr. Russell. The Court questions the witness. 5:20 P. M. Recess for five minutes.

The trial resuming, Dr. Sexton takes the stand and cross-examination by Mr. Russell proceeds. 5:35 P. M. Redirect examination by Mr. Stanley. No recross-examination.

Mr. Stanley having completed his examination of the witness, announces to the Court that he has no other witness present; that he had intended to call Dr. Irwin of Olaa, but Dr. Irwin was called to Waimea on a business trip and will not be back until eleven o'clock to-night; and that he is his last witness. [119]

Mr. Stanley requests that this matter be continued until to-morrow morning at nine o'clock, so that he may be able to call Dr. Irwin.

Mr. Russell announces that the plaintiff would like to go on with the case and finish it to-night as Mr. Patterson will leave by the Mauna Kea for Honolulu to-morrow to appear in the Supreme Court on Saturday morning at ten o'clock.

Mr. Stanley in reply to the question of the Court as to what Dr. Irwin will testify, announces that he would testify as Dr. Sexton has testified.

Mr. Stanley asks if counsel for the plaintiff will admit that Dr. Irwin, if he were called, would testify the same as Dr. Sexton has testified. He



asked that the plaintiff's counsel so admits, he will be ready to go on at any time the Court mentions.

The Court proceeds to excuse the jury until to-morrow morning, but before the order is complete, Mr. Russell announces that the plaintiff will admit, if the Court is disposed to granting a continuance until to-morrow morning, that Dr. Irwin would testify, if called, the same as Dr. Sexton has testified to.

The Court does not accept the statement of Mr. Russell.

Mr. Russell then announces that they will admit that if Dr. Irwin would be called, he would testify the same as Dr. Sexton has been testifying.

Mr. Stanley announces that with that the defendant rests.

The Court inquires whether counsel have their instructions ready.

Mr. Russell announces that the plaintiff's instructions are ready.

Mr. Stanley announces that the defendant's instructions are partly ready.

Mr. Stanley then asks the Court to continue this cause until 7:30 o'clock this evening so that by that time he will have all of his instructions ready.  
[120]

The Court grants the request and continues this cause until 7:30 o'clock this evening, and the jury is excused until that time.

5:48 P. M. Recess until 7:30 P. M.

EVENING SESSION—7:30 o'clock.

L. No. 791—DAMAGES.

MARGARET FRAGA, by ALFRED FRAGA, Her  
Guardian ad Litem,

Plaintiff,

vs.

HOFFSCHLAEGER COMPANY, LTD.,  
Defendant.

### FURTHER TRIAL.

The respective parties being ready, by order of the Court, the clerk calls the roll of the jury and the same shows that all of its members are present.

Mr. Russell requests that the jury now visit the premises where the accident occurred.

No objection by the defendant.

The COURT.—“Gentlemen, there being no objection to it, I believe I shall allow that. I do that with a great deal of hesitation, however. I want to state that no person is allowed or privileged to point out to the jurors any particular features or any particular, except to say, ‘Here is the place for you to examine.’ The attorneys, witnesses and the Court are included in that order.”

Mr. Russell asks the Court if the Court will accompany the jury.

The Court replies in the affirmative.

The Court instructs the jury that while at the scene of the accident, that the jurors do not point out to each other anything because that will be evi-

dence without coming to you under oath; [121] and that they should not permit anyone to tell them anything.

The Court announces that it desires to modify the order heretofore made in order that a stipulation with regard to the condition of the premises to be viewed may be included, if counsel will so stipulate and agree.

Counsel stipulate that the premises to be viewed are practically in the same condition now as they were when the accident happened.

The Court orders that with that stipulation, the jury may go and view the premises.

7:45 P. M. The jury, accompanied by the Court, clerk, bailiff, and Mr. Patterson proceed to view the premises, returning to court at 7:50 P. M.

At this time the jury is excused pending the settlement of instructions by counsel.

8:48 P. M. The jury is called into court and the roll-call of the jury is waived by counsel.

Counsel for the respective parties agree that argument be limited to  $\frac{3}{4}$  hour to each side.

The Court announces its opinion to be that it will be advisable to conclude the argument to-night and charge the jury to-morrow as it will be too late to charge the jury to-night.

Counsel for the respective parties agree with the Court.

8:50 P. M. Mr. Patterson argues to the jury and ends his argument at 9:22 P. M.

9:23 P. M. Mr. Stanley argues to the jury and ends his argument at 10.08 P. M.

At this time the Court declares a recess of five minutes.

The Court reconvening the jury returns to court.

10:16 P. M. Mr. Russell argues to the jury and closes the argument at 10:47 P. M.

The argument having been concluded, the Court announces that it will not deliver a charge to the jury until to-morrow morning.

The Court admonishes the jury again not to discuss this case among themselves nor with others nor allow others to discuss same in their hearing. The Court instructs the jurors to have their [122] minds free until after the Court has charged them and they have retired to deliberate upon their verdict.

The Court continues this cause until to-morrow morning at ten o'clock and excuses the jury until that time.

10:48 P. M. The Court adjourns until to-morrow morning at the hour of ten o'clock.

Minutes of May 26th, 1921.

Approved.

(Sgd.) J. W. THOMPSON,

Acting Judge of the Circuit Court of the Fourth  
Judicial Circuit, Territory of Hawaii. [123]

In the Circuit Court of the Fourth Judicial Circuit,  
Territory of Hawaii.

January Term, A. D. 1921.

Friday, May 27th, 1921.

Present: Honorable J. W. THOMPSON, Judge  
Presiding.

THOMAS PEDRO, Jr., Asst. Clerk and  
Stenographer.

GEORGE K. MILLS (Stenographer Special).

Court opened by Police Officer Joseph Higgins at  
10 o'clock A. M.

L. No. 791—DAMAGES.

MARGARET FRAGA, by ALFRED FRAGA, Her  
Guardian ad Litem,

Plaintiff,

vs.

HOFFSCHLAEGER COMPANY, LIMITED,  
Defendant.

**Minutes of Court—May 27, 1921—Trial (Continued).**

J. W. Russell, Esq., appearing as attorney for the  
plaintiff.

W. L. Stanley, Esq., appearing as attorney for the  
defendant.

By order of the Court the clerk calls the roll of  
the jury and the same shows that all of its members  
are present.

The Court charges the jury.



The Court having completed its charge to the jury, Juror George H. Akau asks for defendant's request for instruction No. 14. No objection.

The Court again reads the defendant's request for instruction No. 14.

Mr. Stanley, on behalf of the defendant, excepts to the following instructions requested and allowed and given by the Court, to wit, Numbers 4, 5, 6, 7, 8, 10, 11, and 12, and also to a certain portion of the Court's oral instruction.

The COURT.—“Let the exception be noted.”  
[124]

Mr. Russell, on behalf of the plaintiff, excepts to the Court's giving of defendant's request for instructions Nos. 7 and 12.

The COURT.—“Let the exception be noted.”

Joseph Higgins is sworn specially to take charge of the jury, as bailiff.

10:40 A. M. The jury retires in charge of the above-named specially sworn bailiff.

At this time the Court declares a recess.

12:19 P. M. The jury, by order of the Court, returns to court.

The Court announces that inasmuch as the jury has not announced that they have reached it a verdict, it is presumed that they have not; and it now being time for lunch, the Court will take a recess, during which time they will have lunch. The Court orders the jury to proceed to Hilo Hotel for lunch and to return after their lunch to their room for further deliberation.

The Court further announces that it has been informed that it has been the custom in this court that the assistant clerk is specially sworn in together with the bailiff to take charge of the jury while proceeding to, at, and returning from lunch to the court.

The Court inquires of counsel for the respective parties if *their* is any objection, and they reply in the negative.

Whereupon Thomas Pedro, Jr., and Joseph Higgins are specially sworn as bailiffs to take charge of the jury as above indicated.

12:23 P. M. The jury in charge of the above-named bailiffs proceed to the Hilo Hotel for lunch.

1:20 P. M. The jury in charge of the above-named bailiffs return to the court and the jury retire to their room.

2:10 P. M. The jury returns to the court and in answer to the Court's query as to whether they have reached a verdict, announced: "Yes, your Honor."

The verdict, by order of the Court, is read in open court and is as follows: "We, the jury in the above-entitled cause, find for the plaintiff and assesses and award damages in the sum of Seven Thousand Two Hundred Fifty Dollars (\$7,250.00)."

(Sgd.) T. O. MITCHELL,

Foreman. [125]

Mr. Stanley, on behalf of the defendant, excepts to the above verdict on the ground that it is contrary to the law and the evidence and the weight of the evidence and on the ground that the damages

awarded thereby are excessive. Mr. Stanley gives notice of a motion for a new trial.

The COURT.—“Let the exception and notice be noted.”

Mr. Russell, on behalf of the plaintiff, thanks the jury.

The Court announces to the jurors that their services, owing to the fact that the Court has to go to its own circuit to conduct some business, and to the further fact that Monday next is a legal holiday, will not be needed until Tuesday morning.

The jurors are therefore excused until Tuesday, May 31, 1921, at the hour of nine o'clock.

Mr. Stanley requests that the Court order the stenographer to transcribe the proceedings of the case just finished.

The Court announces that if the order is made the payment for the transcript will be paid by the party ordering same, and not by the Court.

Mr. Stanley entirely agrees with the Court, and asks that at the final termination of the case, the costs for the transcript will be included in the cost bill, to be paid by the losing party. The Court grants the request.

Mr. Stanley further requests that the court make an order giving the defendant thirty (30) days from and after the delivery of the transcript, within which to file its bill of exceptions. Mr. Russell announces that there is no objection.

The COURT.—“The request is granted and the defendant may have thirty (30) days after the receipt of the transcript from the stenographer.”

2:40 P. M. Court adjourns until Tuesday, May 31, 1921, at the hour of nine o'clock.

Minutes of May 27, 1921.

Approved.

(Sgd.) J. W. THOMPSON,  
Acting Judge of the Circuit Court of the Fourth  
Judicial Circuit, T. H. [126]

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In the Circuit Court of the Fourth Judicial Circuit,  
Territory of Hawaii.

January Term, A. D. 1921.

Wednesday, June 1st, 1921.

Present: Honorable J. W. THOMPSON, Judge  
Presiding.

THOMAS PEDRO, Jr., Asst. Clerk and  
Stenographer.

Court opened by Police Officer Joseph Higgins at  
nine o'clock.

L. No. 791—DAMAGES.

MARGARET FRAGA, by ALFRED FRAGA, Her  
Guardian ad Litem,

Plaintiff,

vs.

HOFFSCHLAEGER COMPANY, LTD.,  
Defendant.

**Minutes of Court—June 1, 1921—Judgment and  
Cost Bill.**

J. W. Russell, Esq., appearing as attorney for the  
plaintiff, presents the judgment and the cost bill.

The COURT.—“Mr. Clerk, in the case of Margaret Fraga by Alfred Fraga, her guardian *ad Litem*, plaintiff, against Hoffschlaeger Company, Ltd., defendant, you may enter a judgment in the sum of \$7,250.00 as damages. Then you may ascertain the amount of the court costs and enter in the blank here on the document, marked plaintiff’s bill of costs, and also the total.”

Recess.

Minutes of June 1st, 1921.

Approved.

(Sgd.) J. W. THOMPSON,  
Acting Judge of the 4th Circuit Court, T. H. [127]

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In the Circuit Court of the Fourth Judicial Circuit,  
Territory of Hawaii.

January Term, A. D. 1921.

Wednesday, June 22, 1921.

Present: Honorable J. W. THOMPSON, Judge  
Presiding.

THOMAS PEDRO, Jr., Asst. Clerk and  
Stenographer.

**Minutes of Court—June 22, 1921—Trial (Continued).**

Court opened at ten o’clock A. M., by Police Officer Joseph Higgins.

Mr. Patterson announces to the Court that he desires to take up the motion for a new trial in the case of Fraga vs. Hoffschlaeger Co., some time to-



morrow morning and that he had spoken to Judge Parsons about it.

The Court sets this matter down for disposition to-morrow morning at nine o'clock.

Minutes of June 22, 1921.

Approved.

(Sgd.) J. W. THOMPSON,  
Acting Judge of the Circuit Court of the Fourth  
Judicial Circuit, Territory of Hawaii. [128]

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In the Circuit Court of the Fourth Judicial Circuit,  
Territory of Hawaii.

January Term, A. D. 1921.

Thursday, June 23, 1921.

Present: Honorable J. W. THOMPSON, Judge  
Presiding.

THOMAS PEDRO, Jr., Asst. Clerk and  
Stenographer.

Court opened at ten o'clock by Police Officer  
Joseph Higgins.

L. No. 791—DAMAGES.

MARGARET FRAGA, by ALFRED FRAGA, Her  
Guardian ad Litem,

Plaintiff,

vs.

HOFFSCHLAEGER COMPANY, LTD.,

Defendant.

**Minutes of Court—June 23, 1921—Motion for a New  
Trial.**

F. Patterson, Esq., appearing as attorney for the  
plaintiff.

C. F. Parsons, Esq., appearing as attorney for the defendant.

By consent of counsel this matter is continued until to-morrow morning at nine o'clock. [129]

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In the Circuit Court of the Fourth Judicial Circuit,  
Territory of Hawaii.

January, A. D. 1921, Term.

Friday, June 24, 1921.

Present: Honorable J. W. THOMPSON, Judge  
Presiding.

THOMAS PEDRO, Jr., Asst. Clerk and  
Stenographer.

L. No. 791—DAMAGES.

MARGARET FRAGA, by ALFRED FRAGA, Her  
Guardian ad Litem,

Plaintiff,

vs.

HOFFSCHLAEGER COMPANY, LTD.,

Defendant.

**Minutes of Court—June 24, 1921—Trial Con-  
tinued).**

**MOTION FOR A NEW TRIAL.**

C. F. Parsons, Esq., appearing as attorney for the defendant-movant.

J. W. Russell, Esq., appearing as attorney for the plaintiff.

Mr. Parsons announces to the Court that before the motion for a new trial is argued, Judge Stanley would like to have the transcript of evidence and go over the same; that the transcript is not yet finished.

By consent of counsel this matter is continued until moved on.

Minutes of June 24th, 1921.

Approved.

(Sgd.) J. W. THOMPSON,  
Acting Judge of the Circuit Court of the Fourth  
Judicial Circuit, Territory of Hawaii. [130]

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In the Circuit Court of the Fourth Judicial Circuit,  
Territory of Hawaii.

January, A. D. 1921, Term.

Wednesday, November 2, 1921.

The Court convened at 10 o'clock A. M.

Present: Honorable HOMER L. ROSS, Judge  
Presiding.

BERNARD H. KELEKOLIO, Assistant  
Clerk.

P. MAURICE McMAHON, Reporter.

LAW CASE No. 791—DAMAGES.

MARGARET FRAGA, by ALFRED FRAGA, Her  
Guardian ad Litem,

Plaintiff,

vs.

HOFFSCHLAEGER COMPANY, LTD.,  
Defendant.

**Minutes of Court—November 2, 1921—Trial (Continued).**

**MOTION FOR A NEW TRIAL.**

Present: J. W. Russell of the firm of Russell & Patterson, appearing for the plaintiff.

C. F. Parsons, appearing for the defendant.

This cause having come up on a motion for a new trial, Mr. Russell stated in open court that he has arrived at some understanding with Mr. Parsons and that they have agreed to set this case for hearing on the motion for a new trial for the 7th day of November, 1921, whereupon the Court ordered that this case may be set down for hearing on the motion for a new trial on the 7th day of November.

By the Court:

(Sgd.) BERNARD H. KELEKOLIOO,  
Assistant Clerk. [131]

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In the Circuit Court of the Fourth Judicial Circuit,  
Territory of Hawaii.

January, A. D. 1921, Term.

Monday, November 7, 1921.

The Court convened at 10 o'clock.

Present: Honorable HOMER L. ROSS, Judge  
Presiding.

BERNARD H. KELEKOLIO, Assistant  
Clerk.

P. MAURICE McMAHON, Reporter.

WILLIAM K. ELLIS, Bailiff.

## L. No. 791—DAMAGES.

MARGARET FRAGA, by ALFRED FRAGA, Her  
Guardian ad Litem,

Plaintiff,

vs.

HOFFSCHLAEGER COMPANY, LTD.,

Defendant.

**Minutes of Court—November 7, 1921—Trial (Continued).**

HEARING: MOTION FOR A NEW TRIAL.

Present: Russell & Patterson, appearing for the plaintiff.

C. F. Parsons and Stanley, appearing for defendant.

This cause coming on to be heard on the motion of the defendant for a new trial and both attorneys being present, Mr. Stanley proceeded to present his argument to the court in support of the motion for a new trial.

Mr. Stanley reads the "Daily Post-Herald" of May 24, 1921, in open court regarding the damage suit of Miss Fraga vs. The Hoffschlaeger Company, Ltd. Mr. Stanley also quotes authorities in support of his contention where the Court erred, at the same time handing copy of said authorities to the Court and Mr. Russell, for the plaintiff.

At 11:30 A. M. Mr. Stanley hands to the Court a skeleton brief at the same time handing Mr. Russell a copy. [132]



Mr. Russell at this time asked the Court that he be allowed to answer the argument of Mr. Stanley, as he is to leave for Honolulu, whereupon the Court allowed him to do so, with the permission of counsel, however.

At 11:35 o'clock A. M., the Court took a recess.

At 11:45 o'clock A. M. the Court reconvened and Mr. Russell proceeded to present his argument to the court in reply to that of Mr. Stanley.

At 12:30 o'clock P. M., Mr. Russell having concluded his argument before the Court, and the Court having ordered a recess to be taken, Mr. Edmondson, appearing in court, asked that he be allowed to present some matters before a recess is taken, whereupon the Court allowed him to present such matters as he desired.

#### AFTERNOON SESSION

At 1:35 o'clock P. M., the Court having reconvened, Mr. Stanley proceeded to again present his argument to the Court from the point where he rested when Mr. Russell made his argument.

Mr. Stanley also stated to the Court that all the assignments of errors are relied on with the exception of that part relating to the misconduct on the part of Russell & Patterson.

At 2:00 o'clock P. M., Mr. Patterson presents his argument to the Court in reply to that of Mr. Stanley and moves the Court that the motion for a new trial be denied.

Mr. Patterson having concluded his argument, Mr. Stanley asked that he would like to have it appear in the minutes that no copies of the counter-

affidavits were ever served on either counsel for the defendants in this case, and the further fact these affidavits were signed on June 15, 1921, and were not filed until three months later September 27, 1921.

Mr. Stanley again presents his argument to the Court and [133] having concluded his argument the Court stated as follows:

The COURT.—I will give this case careful consideration. Whatever conclusions I come to about it I will let you know. That is the best I can do.

At 3:05 o'clock P. M., there being no further business, the Court adjourned until to-morrow morning at ten o'clock.

By the Court:

(Sgd.) BERNARD H. KELEKOLIO,  
Assistant Clerk. [134]

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In the Circuit Court of the Fourth Judicial Circuit,  
Territory of Hawaii.

**DAMAGES.**

MARGARET FRAGA, by ALFRED FRAGA,  
Her Guardian ad Litem,

Plaintiff,

vs.

HOFFSCHLAEGER COMPANY, LIMITED,  
Defendant.

**Transcript of Evidence.**

RUSSELL & PATTERSON, attorneys for Plaintiff.

SMITH, WARREN & STANLEY and CHARLES  
F. PARSONS, Attorneys for Defendant.

J. W. THOMPSON, Esquire, Judge Presiding.  
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**Testimony of H. V. Patten, for Plaintiff.**

Swearing of witness by Clerk of the Court:

Q. What is your name? A. H. V. Patten.

(Examination of witness by Mr. RUSSELL.)

Q. You are the cashier of the First Bank of Hilo? A. Yes.

Q. As cashier you are a member of the Board of Directors, are you not? A. Yes.

Q. I will show you an instrument described as a lease executed on the 21st day of October, 1919, between the First Bank of Hilo and Hoffschlaeger Co., Ltd., and ask you if the signature is that of the First Bank of Hilo?

A. (Examination of instrument by witness:) Yes, it is.

Q. That is, this lease was executed between you and Hoffschlaeger Co., Ltd.? A. Yes.

Q. They are occupying the premises referred to under this lease? A. Yes.

Q. The premises described in this lease are the store premises in the building known as the Old First Bank of Hilo building? A. Yes.

Q. And Hoffschlaeger Company occupy no other premises in that building than the premises described in this lease? A. No.

Q. They do not occupy any other part? A. No.

Q. The elevator referred to in this lease—

Judge STANLEY.—Objected to as (here lease was handed by Mr. Russell to Judge Stanley.)



(Testimony of H. V. Patten.)

Judge STANLEY.—No objection to lease.

Judge THOMPSON.—There being no objection to this document being admitted in evidence, it is so ordered and marked Plaintiff's Exhibit "A."

(Continuation of Examination by Mr. RUSSELL.)

Q. I will ask you if the elevator referred to in this lease is the elevator in front of the store that they occupy?

A. I do not know what elevator you refer to.

Mr. RUSSELL.—I will show you the lease.

A. Why I don't know whether I like to go into this thing without referring, conferring with my attorney.

Q. The question is whether the elevator in this lease is the elevator in front of Hoffschlaeger's store?

A. The elevator referred to is the one in front of Hoffschlaeger's store.

That is all.

Judge STANLEY.— No questions. We will at this time admit that the defendant is a corporation.

### **Testimony of Margaret Fraga, in Her Own Behalf.**

Swearing of witness by Clerk of the Court:

Q. What is your name? A. Margaret Fraga.

(Examination of Witness by Mr. RUSSELL.)

Q. You are the plaintiff in this case? A. Yes.

Q. And this gentleman here (indicating) is your father? A. Yes.

Q. How old are you?

(Testimony of Margaret Fraga.)

A. I am thirteen, I will be fourteen on October 29th. [141—2]

Q. You live with your parents, your father and mother? A. Yes.

Q. And in Hilo? A. Yes.

Q. At the Waiakea Homesteads? A. Yes.

Q. Do you remember an accident that happened to you on the 20th of August 1920? A. Yes.

Q. Before the accident where had you been?

A. I had just come from Holmes' Store on an errand for Mrs. Cabrinha.

Q. Which way were you going?

A. I was going back.

Q. Homes' Store is on Waianuenue Street, is it not? A. Yes.

Q. You know that is Waianuenue Street?

A. Yes.

Q. Through what street were you proceeding to Cabrinha's Store?

A. On the street that Hoffschlaeger's Store is on.

Q. Do you remember that is known as Keawe Street now? A. Yes.

Q. It used to be Bridge Street? A. Yes.

Q. Do you know the name of the building that the store of Hoffschlaeger Company to which you referred is called; the name under which it was known? A. I do not know.

Q. Do you know that it is the old Bank Building? A. Yes. [142—3]

Q. And on what street is Cabrinha's store?

(Testimony of Margaret Fraga.)

A. It is on the same street as Hoffschlaeger Company.

Q. And it is on the Puueo side of Hoffschlaeger's store?    A. Yes.

Q. And Homes' Store is on the Waiakea side?  
A. Yes.

Q. So that in going from Homes' Store to Ca-brinha's Store, the nearest path would lead, nearest path would lead you past Hoffschlaeger's Store, in the Old Bank Building?    A. Yes.

Q. Now, as you approached the store of Hoffschlaeger & Company, were you walking slowly or fast?    A. I was walking slowly.

Q. Did you have anything in your arms?

A. I had two packages.

Q. Large or small?    A. Small ones.

Q. What did they contain?

A. One twenty-five cents worth of lemons, and the other yellow cornmeal.

Q. You say you were walking slow?    A. Yes.

Q. What time was it?    A. About three o'clock.

Q. In the afternoon?    A. Yes.

Q. Will you tell what happened then as you were approaching the store of Hoffschlaeger & Company? [143—4]

A. Just as I was getting there I heard a call across the street and as I looked I went down.

Q. Do you know who called you?

A. It was Dan Borden, because when I was at the corner, I saw this boy coming.

(Testimony of Margaret Fraga.)

Q. How long after you looked over was it that you fell; about how many steps had you taken?

A. I think about one step. I went down right away.

Q. Had you walked past over the sidewalk before?     A. Yes.

Q. Did you ever fall in any hole?     A. No.

Q. You had never stepped in any hole before?

A. No.

Q. Had you ever met with any accident on that sidewalk before then? Had you stumbled at any time?     A. No.

Q. How often had you passed this place?

A. Before I got hurt I used to go past every day.

Q. You are related to Mr. Cabrinha?

A. Yes.

Q. And you used to go there frequently?

A. Yes.

Q. Now, after you fell in this hole what happened?

A. I do not remember anything, I felt kind of dizzy.

Q. You remember being carried up?

A. When I was about the top I remember somebody taking me home. [144—5]

Q. You say about the top?

A. The elevator was near the sidewalk.

Q. You were taken up on the elevator?

A. Yes.

Q. And from the elevator you were taken into the store?

(Testimony of Margaret Fraga.)

A. Yes. Because I asked them to do so. Cabrinha's store.

Q. You were taken into Hoffschlaeger's store?

A. No.

Q. You asked to be taken to your mother's at Cabrinha's? A. Yes.

Q. Then what happened?

A. Before this they wanted to send me to my mother at Cabrinha's in a machine.

Q. How long were you at Cabrinha's?

A. We got there the man took me to a doctor.

Q. What doctor. A. Osorio.

Q. And from there what happened to you? What happened to you?

A. I went home; some one took me home; a man took me home in a machine.

Q. Will you state whether or not when you first realized that you were being carried, you suffered any pain?

Judge STANLEY.—Objection; rather leading. The witness is—

Mr. RUSSELL.—I will withdraw the question.

Q. Will you describe your condition with reference to pains?

A. At first my right leg, my right knee pained me, and my both arms were scratched and my both feet, but I did [145—6] not know my back was scratched and my left leg scratched.

Q. Any other parts of the body?

A. There was a hole in my right eye.

(Testimony of Margaret Fraga.)

(Examination by jury of the scar of alleged hole in right eye.)

Q. Is that hole which you refer to at the place that you have the scar now?      A. Yes.

Q. Did you have any scars before this accident?  
A. No.

Q. Was it bleeding at the time?      A. Yes.

Q. These pains which you refer to you felt as you were being taken out of Hoffschlaeger & Company?      A. Yes.

Q. State how long those pains continued.

A. They continued till I got home; mama put on a hot-water bag. Some *othe* of them have healed, others not.

Q. After you got home what did you do?

A. I went to bed.

Q. How long did you remain in bed?

A. Three weeks steady till I went to school.

Q. Will you state whether or not you suffered any pains during that time?      A. Yes.

Q. Will you tell the jury as to how you suffered pains and whether or not it was continuous or merely at times? How long did you suffer? Did you suffer pain at the time?      A. Yes? [146—7]

Q. You said some parts of your body had healed. How long after the accident, did those parts begin to heal?

A. The scratches went away about two weeks after that.

Q. What scratches?



(Testimony of Margaret Fraga.)

A. I got scratched on the arms and back and hip.

Q. And how about the eye?

A. The eye was bleeding and there was a deep hole and the doctor had to put cotton in it.

Q. How long before that healed?

A. It healed about a month.

Q. And about your leg after you got out of bed; will you describe the condition of your leg?

A. The doctor put some plaster on it; I do not know.

Q. State how you felt with reference to the leg?

A. It began to swell up; I could hardly walk.

Q. Before the accident had you any pains in either leg?     A. No.

Q. You say that it would swell up. Just how would it swell up and how often would it swell up?

A. It used to swell up down here (indicating the calf and the ankle).

Q. And this would occur how often?

A. Nearly every day the leg used to hurt me.

Q. How about now? Do you feel any pains?

A. Yes, once in a while. It does not hurt me now as I have a rubber band on it.

Q. It is around your knee now?     A. Yes. [147—8]

Q. Are you able to walk comfortably now?

A. No.

Q. How does walking affect you?

A. Every time I walk it seems that the bones are going back and forth.

Q. Is it painful?     A. Yes.

(Testimony of Margaret Fraga.)

Q. How much walking do you do?

A. I walk around the house, that is all.

Q. Do you go to school?      A. Yes.

Q. How do you go to school?

A. Papa's uncle takes me to school and a Hawaiian woman brings me back from school.

Q. How long have you lived out there at the homestead?

A. About three years in June before the accident.

Q. Before the accident, how would you go to school?

A. I used to walk to the Waiakea Depot and take the train from there to Hilo Station and from there I walked to school.

Q. And do your brothers and sisters go to school?

A. They do the same now as I used to do before. They take the train.

Q. Do you do any playing?      A. No.

Q. You testified that immediately after the accident that you were taken to Doctor Osorio's office?      A. Yes.

Q. And he attended you since?      A. Yes.

Q. Have you had any other doctor?      A. No.  
[148—9]

Q. How often would he come to see you?

A. At first at my house every other day, now I go to his office twice a week, but the last two weeks I have not been there.

Q. You spoke of the swelling of your leg after you got out of bed, will you state whether or not

(Testimony of Margaret Fraga.)

there is any condition of swelling suffered by you now? Does it swell up now?

A. It is swollen to-day.

Q. How often has that occurred lately?

A. Well, it gets swollen every day. I do not know what the matter is.

Q. And do I understand you to mean that it swells up and goes down? A. Yes.

Q. How about when you go to bed at nights, you feel any pain?

A. No, because I take the rubber band off my knee and lay still.

Q. Do you remember going to Dr. Sexton's office sometime ago? A. Yes.

Q. How many times did you go there?

A. Well, I went there to take X-rays of my feet.

Q. How many times?

A. I don't quite remember.

Q. Every time you went there it was for the purpose of having X-rays taken? A. Yes.

Q. Who sent you there? A. Dr. Osorio.

Q. He went with you? [149—10]

A. Once he went with me the other times he sent me there.

Q. And you had photographs taken of your leg?

A. Yes.

Q. Who did it? A. Alfred Souza.

Q. He is the young man employed in the office of Sexton and Heck? A. Yes.

Q. You spoke of the hole in your eye. Do you

(Testimony of Margaret Fraga.)

remember as to whether there were any other injuries about your head?

A. My head was kind of swollen.

Q. Where? A. In back.

Q. Now, just before you fell in this hole and while you were looking at young Borden, did you and he exchange any remarks? Did you speak to Borden? A. No.

Q. Did you hear him remark, "Here comes another duchy"? A. Yes.

Q. He had reference to the dutch cut of your hair? A. Yes.

Q. Did you recall whether anything else was said by him? A. No.

Q. Did you hear anybody say anything to you?

A. Before I went down, no.

Q. Did you see anybody on the side that you were walking on? A. No. [150—11]

Q. Do you remember whether or not anyone grabbed you as you were falling? A. No.

Q. No one grabbed you? A. No.

Q. Have you seen this place since then?

A. Well, I pass there.

Q. You do not know how deep it is? A. No.

Cross-examination of Witness MARGARET FRAGA by Judge STANLEY.

Q. Tell me, Margaret,—you do not mind me calling you Margaret—what time of the day was it that you fell into this elevator?

A. It was about three o'clock in the afternoon.

(Testimony of Margaret Fraga.)

Q. And you were walking from Homes' Store on Waianuenue Street passed Hoffschlaeger's Store on your way to Cabrinha's store? A. Yes.

Q. Mrs. Cabrinha is your aunt? A. Yes.

Q. You say that you saw a boy named Borden on the other side of the street? A. Yes.

Q. And he called out, "Here comes another duchy," and then you say you took about one step and fell into the elevator? That is right?

A. Yes.

Q. So at that time were right on top of the elevator and almost in the hole? A. Yes. [151—12]

Q. Before you heard him call out, "Here comes another duchy," where were you looking?

A. I was looking where I was walking.

Q. That is, looking, going carefully along the street? A. Yes.

Q. And you were doing, that is you were looking where you were going; looking at the sidewalk when you heard the remark, "Here comes another duchy"? A. Yes.

Q. And then you lifted your foot and fell in?

A. I looked across the street and took a step and fell into the hole.

Q. Now, you know what the hole in the sidewalk is for? A. Yes.

Q. What is it for?

A. For loading freight.

Q. You know there is an elevator down there, down that hole and on that elevator is placed

(Testimony of Margaret Fraga.)

freight, and it is brought flush with the street and goods are put on the sidewalk or taken immediately from the elevator on to trucks and taken away?

A. Yes.

Q. How long have you lived in Hilo, Margaret?

A. I do not quite remember.

Q. How old were you when you came here first?

A. I do not know.

Q. You were born in Hilo?      A. No.

Q. Where do you go to school now?

A. Hilo Union School. [152—13]

Q. How long have you been going to school there?

A. Two years.

Q. And before that time were you going to school in Hilo?      A. Yes.

Q. Where was that?      A. Sister's school.

Q. How long were you there? About how long?

A. I went there,—I was there about four years.

Q. And this aunt of yours is married to a Mr. Cabrinha, whose store is on Keawe Street just beyond Hoffschlaeger's?

A. Yes.

Q. Is there a garage next to Hoffschlaeger's, on the Puueo side and then a street runs down towards the sea and then Cabrinha's on the opposite side of that street?      A. Yes.

Q. What is the name of that street running down between Cabrinha's and the garage?

A. I have forgotten the name.

Q. Shipman Street, is it not?

A. I do not know.



(Testimony of Margaret Fraga.)

Q. How long have you known of this freight elevator that was in front of Hoffschlaeger's store?

A. Well, since I have been living at Puueo.

Q. And how long was that, since your were going to the Sister's school?

A. About three years.

Q. You have been living at Puueo at least three years?

A. I stayed there with my aunt then I went down to the houselots. [153—14]

Q. You were staying with your aunt, Mrs. Cabrinha, and went to the Sister's school, and after that went to live at the houselots? A. Yes.

Q. And how would you go to the Sister's school from your aunt's?

A. Through Keawe Street and through the other side of the bridge.

Q. You would walk down Keawe Street past Hoffschlaeger's on Wainuenue Street and after to the Sister's school? A. Yes.

Q. And all this time when you were living at Mrs. Cabrinha's you had to pass Hoffschlaeger's store every day to go to school?

A. No, I cut through the other bridges.

Q. But which way did you generally go, through Keawe street, and on your way out in the morning and you would come back the same way?

A. Sometimes.

Q. But sometimes along Keawe Street?

A. Yes.

(Testimony of Margaret Fraga.)

Q. And while living at your aunt's you got to know that—where this elevator was, and what it was used for? A. Yes.

Q. Because you saw it open?

A. I saw them unloading freight there.

Q. As a matter of fact, you saw them unloading freight there quite a number of times a day?

A. Yes.

Q. You had seen freight there very often, and you know what it is for? A. Yes. [154—15]

Q. Now having heard this call that Mr. Borden made, "Here comes another duchy," you took a step and found yourself falling in the hole?

A. Yes.

Q. And up to that time you had been looking where you were going? A. Yes.

Q. Now when you fell into the hole do you remember hitting anything?

A. I do not. No, I got down there I was dizzy.

Q. Things were going around?

A. Yes.

Q. Little dizzy? A. Yes.

Q. You got less dizzy as the elevator was coming up towards the sidewalk? A. Yes.

Q. What was the first thing you knew when you got over this dizzy spell?

A. When I was at the top of the sidewalk?

Q. When it was coming up nearly up to the sidewalk?

A. I saw myself in the boy's arms.

Q. You saw that he had you in his arms?

(Testimony of Margaret Fraga.)

A. He was holding me.

Q. He was holding you by one arm?

A. I suppose so. Yes.

Q. And you were standing up?

A. Yes.

Q. Then when the elevator came right up to the sidewalk you say that some one said, "she ought to be taken home?" Who was it that said that?

A. I don't know. I think it was a Japanese, the one who was holding me said that. [155—16]

Q. Then what did you say?

A. I told them that it was no use going home as there was nobody at home. I wanted to go over to my auntie's store as my mother was there.

Q. How did you go over to Mrs. Cabrinha's store?

A. This boy took me there—this Japanese boy.

Q. You walked over? A. Yes.

Q. Was he helping you?

A. He was. He was holding me and I was holding the handkerchief over my eye.

Q. You knew then that your eye was cut?

A. Yes.

Q. Don't you remember, Margaret, that being a girl the first thing you thought about was your eye, and you asked the Japanese boy when you were at the bottom of the elevator or coming up whether your eye was badly hurt?

A. If I did, I don't remember.

Q. This little mark over your eye is a mark, is it,

(Testimony of Margaret Fraga.)

that cannot be seen unless one looks for it very closely?

A. It was a mighty deep hole. Yes.

Q. Unless you told them it was there and pointed it out to them they would not know it was there?

A. If my eye was closed they could see it.

Q. If you were asleep lying down, or taking a nap, with your eyes closed a person could see it?

A. Yes.

Q. As you go about, generally, walking around nobody would see it unless you showed it to them?

A. Yes. They would see a deep hole over my eye.

Q. When you say deep hole, what do you mean?

A. It did not go right in the eye, it was in the eyelid. [156—17]

Q. Now, what other marks did you notice on you, when you, before you had gone to the doctor?

A. I saw that both elbows were scratched.

Q. Are there any marks there now? A. No.

Q. And how long did those scratches last?

A. Well, we kept on curing them daily.

Q. What do you mean by curing?

A. Putting medicine on it.

Q. What kind of medicine?

A. Doctor Osorio gave me some ointment to put on.

Q. When did they go away?

A. When I went to school they were still healing.

Q. You went to school on what date?

A. In September.

(Testimony of Margaret Fraga.)

Q. Now, about when?

A. I got hurt on August 20th and three weeks in bed and then I went to school. It would be somewhere around the 11th of September.

Q. Did you not tell Mr. Russell that those scratches went away in about two weeks?

A. Well, yes, one arm was kind of healing and then went away.

Q. One arm was just about healing when you went to school, and the other arm?

A. I mean they were still there but were all gone when I went to school.

Q. Where else had you any scratches besides your arms?

A. My left hip bruised.

Q. Not scratched? A. Yes. [157—18]

Q. How long did that last?

A. It lasted quite a long time; I don't quite remember.

Q. About how long? About two weeks?

A. I don't know how long; about a month.

Q. And about how long about the bruise on the left hip?

A. I think it had got cured before the thigh.

Q. That is all the signs, all the marks, disappeared before four weeks, the forearm and the elbow? A. Yes.

Q. The scratches on the elbow, the bruise on the left hip had gone before four weeks, now what other marks had you?

(Testimony of Margaret Fraga.)

A. There were not other marks left; my knee was scratched.

Q. Had you any other scratches? A. No.

Q. And whereabouts was the left knee scratched?

A. Right on the kneecap.

Q. When did that scratch go away?

A. When I went to take the first X-ray of the leg the scratch was still there so I don't remember.

Q. You had the first X-ray taken before you went to school? A. Yes.

Q. You went to take the first X-ray two weeks after you had the accident?

A. I am not quite sure.

Q. The last time you saw the scratches was the day you went to have the X-ray taken?

A. Two days after that it was gone. [158—19]

Q. Now, Margaret, how do you remember that two days after you went to have the X-ray taken the scratches went away?

A. Because on the Sunday I walked around and looked at my knee and the scratches were healed.

Q. All the marks were gone; on a Sunday; you took a walk around the house? A. Yes.

Q. And you looked at your knee? A. Yes.

Q. And that two days after the X-ray it was already gone? A. Yes.

Q. You said something about not knowing that your back was scratched til you got to the doctor's?

A. Yes.

Q. Where was your back scratched? Right on the back bone? A. Right across the hip.



(Testimony of Margaret Fraga.)

Q. Was that the same place on the left or right hip?     A. Near the left hip.

Q. Part of the same scratch as on the hip?

A. About the middle of it.

Q. When did that one go away?

A. There was no scratch there.

Q. I thought you said you did not know that your back was scratched?

A. I did not know that it was scratched, it was bruised.

Q. Until you got to the doctor's because he examined and found that it was bruised?     A. Yes.

Q. When did that bruise go away?

A. About the same time as the hip. [159—20]

Q. So that at the time you went to school nearly all these marks had gone?     A. Yes.

Q. What, if any, were left?     A. None.

Q. That is right?     A. Yes.

Q. They were all gone?     A. Yes.

Q. Now, what did the doctor do for you when he put you to bed?

A. He rubbed some kind of medicine and put hot-water bags on the hip and back and on the knee.

Q. And how long did those stay on?

A. Well, I kept on changing them until I got out of bed.

Q. You went to school on a Monday? Three weeks after that on Monday?     A. Yes.

Q. And it was on a day before, a Sunday, that you looked while walking around the house, that

(Testimony of Margaret Fraga.)

the marks had all gone off of your knee. Was it a week before that?

A. When I took the X-ray a week before.

Q. You took the X-ray about two weeks after you were hurt, and went to school three weeks after you were hurt? A. Yes.

Q. During the week between the time you took the X-ray and went to school, were you walking around the house?

A. Not regularly in bed.

Q. But how about the two weeks before the X-ray, you were in bed, but after the doctor had the X-ray taken he told [160—21] you you could walk around?

A. He told me to stay in bed as the bone was cracked and to stay in bed.

Q. And told you to stay in bed? A. Yes.

Q. But you did not stay in bed, but got up and walked around the house? A. Yes.

Q. During this time you were lying in bed what pains did you feel?

A. My back was hurting me and my hip and my knee.

Q. When you laid on it?

A. When I laid on it.

Q. And the hip when you touched it?

A. Yes.

Q. And if you did not touch it?

A. Once in a while.

Q. You mean once in a while it would pain if you did not lie or touch it? A. Yes.

(Testimony of Margaret Fraga.)

Q. How about the knee?

A. Pained me always.

Q. Whereabouts did it pain?

A. The sides of the kneecap.

Q. And what kind of a pain was it?

A. A pain.

Q. Not a shooting pain, but a dull pain, was it?

A. Yes.

Q. Had you any other pains at that time?

[161—22]

Q. You have told us that your back, hip and knee pained you; had you any other pains?

A. My head pained me on account of my eye, and still pains me.

Q. Had you any pains in your head before this?

A. Never before. I had slight headaches.

Q. Is it not a fact that in the school year before the accident that you continually had light headaches and you complained to your teacher about them? A. No.

Q. That you had light headaches, and they used to go away? A. Yes.

Q. How often did you have these?

A. Once in a while. When the day was hot I had them.

Q. About how often did you have these headaches? I am talking before the accident.

A. I do not know.

Q. Once every day?

A. Maybe once in a week.

(Testimony of Margaret Fraga.)

Q. And is it not a fact, Margaret, that before the accident happened you had those pains and used to stay away from school.

A. I never stayed home from school.

Q. The school term before the accident; take from January to June of last year?

A. No, I never stayed at home.

Q. You never were marked absent from school?

A. No. [162—23]

Q. Now, Margaret, is it not a fact that before this accident that, take the month of February, 1920, you were away from school for four days?

A. No, I was never absent.

Q. That is on the 4th, 6th, 10th and 11th of February, 1920; that you were away from school on the 9th of March; that you were away from school on the 3d of May; that you were away from school the 8th, 9th, 10th and 29th of June?

A. This was after I got hurt.

Q. Before you got hurt? About the month of February, March, May and June, 1920? You were hurt on August 20, 1920. A. No.

Q. Is it not a fact that in the month of November, 1919, that is the school year before this one, that you were away from the 5th, 6th, and 7th and the 24th?

A. Before I got hurt? I don't remember missing school.

Q. Now, you say that your knee was paining you at the side of the kneecap? A. Yes.

Q. Which knee? A. The left knee.

(Testimony of Margaret Fraga.)

Q. Nothing wrong with the right knee? A. No.

Q. Did you not tell the jury in answer to Mr. Russell that it was the right knee that was scratched?

A. No. The left; both were scratched.

Q. You told Mr. Russell you had pains in the right knee?

A. Maybe, I misunderstood Mr. Russell.

Q. Now, you say that *you* leg swelled up?

A. Yes. [163—24]

Q. Which leg? A. The left leg.

Q. And when did you first notice that it was swelling?

A. The day that I took the X-ray, I noticed it was swollen; we called Doctor Osorio and he took me down to see if—

Q. It was when you went down to take the X-ray you mean to Dr. Sexton's?

A. At home, it was swollen, and I called Dr. Osorio and he took me with him to have the X-ray taken.

Q. That is the first time you noticed the swelling in the knee? A. The whole foot.

Q. Do you mean the foot or the leg?

A. The whole foot, the whole leg down to the foot.

Q. And you pointed to your calf and to your ankle, in fact Mr. Russell said your calf; is that the place? A. Swollen at the calf and the ankle.

Q. Now, what did the doctor do for that?

(Testimony of Margaret Fraga.)

A. He gave me some medicine to rub on it and hot-water bags.

Q. You had had water-bags before?

A. Even now I put it on.

Q. How often does it pain you?

A. It pains me always; but sometimes it pains more than the other.

Q. How often does it pain so you have to put the hot-water bag on?

A. I do not quite remember.

Q. Well, how long ago did you put on the hot-water bag?

A. About two weeks when I went out and I came home I put the hot-water bag on. [164—25]

Q. And how long before that?

A. I do not remember. I do not know.

Q. Is it so long ago you do not remember?

A. A short time ago.

Q. About how long ago? A. I do not know.

Q. How long since you last had it?

A. Two weeks from now.

Q. But you do not know how long before?

A. I do not remember.

Q. You say it does not pain you now because you have a rubber band. A. Yes.

Q. How long have you had a rubber band on?

A. I do not remember.

Q. About how long? Would it be a month?

A. Longer than that.

Q. A rubber band about a month ago?

A. About that time.



(Testimony of Margaret Fraga.)

Q. Was it before or after you went to the doctor's for the second X-ray?     A. It was after.

Q. How long after?

A. I don't know. It has been about two months.

Q. But since you put the rubber band on you don't have so much pain?     A. No.

Q. As you told Mr. Russell, once in a while it pains you, but the pain is not much now as I have a rubber band on it?     A. Yes. [165—26]

Q. Now, you said something about,—you said that your bones were going back and forth; what do you mean by that?

A. When I spoke of the—the bones,—the two joints go together.

Q. Whereabouts are those two joints?

A. Near the knee.

Q. It feels as if there were two bones there going together?

A. When I spoke I meant that it feels as if there were two bones going together.

Q. You feel as if two bones go against each other?

A. Yes.

Q. What kind of a feeling is it?

A. Mighty hard to describe.

Q. Do the best you can?

Q. Has anybody told you about two bones coming together?     A. I learned it at school.

Q. You learned it at school—what two bones coming together?

A. Whenever you move two bones go together.

(Testimony of Margaret Fraga.)

Q. Like the elbow goes—the two bones in the elbow go one against the other? A. Yes.

Q. How does it feel? You mean it feels as if the side bones and the leg bones were going together or what?

A. I do not know—I cannot describe it.

Q. It is only something you can feel yourself?

A. Yes. [166—27]

Q. You can't feel two bones when you put your hand on it, that there might be two bones there?

A. There is a real feeling.

Q. Now, you say, Margaret, that you drive to school in an automobile? A. Yes.

Q. Do you do any walking at all?

A. I walk around the house.

Q. Do you do any other walking?

A. While we are changing rooms at school.

Q. You don't walk around downtown at all?

A. No.

Q. Are you sure of that? A. I never walk.

Q. Is it not a fact that you, since you got hurt, have walked around town, down Wainanuenue Street and walked down Keawe Street?

A. Well, I hardly walk around.

Q. Do you mean that you never walk around the town?

A. But since I got a car what is the use of my walking.

Q. I am not asking what is the use of walking. Is not it a fact that you do walk around town?

A. I do not understand you.

(Testimony of Margaret Fraga.)

Q. Is it not a fact that since you got hurt you have been walking around town? Is not that true?

A. Well, I have not been walking regularly around town.

Q. But you have been walking around only just short distances?

A. Only when I got off the car.

Q. Have you not walked down Waianuenue and Keawe Street at any time? [167—28]

A. Never walked down any distance, except yesterday from here down to the Hilo Drug Store to get a car.

Q. Is it not a fact, Margaret, that since your accident you have walked that distance,—walked along around Keawe Street to your uncle's store?

A. I have not.

Q. Have not walked past Keawe Street at all? Along Waianuenue Street to Keawe Street and on Keawe Street?

A. Never have except around our yard.

Q. Around your yard at your home lot?

A. Yes.

Redirect Examination of Witness MARGARET FRAGA by Mr. RUSSELL.

Q. You said, Margaret, in answer to Judge Stanley's question, that you had seen loading of freight from the elevator in front of Hoffschlaeger's store before the time of the accident. Do you remember how many times you saw that?

A. Don't remember how many times, but remember seeing it.

(Testimony of Margaret Fraga.)

Q. But you can't give any idea as to how many times you saw this? A. No.

Q. Did you see it more than once?

A. More than once.

Q. Can you tell, when a few times? How many times you saw it.

A. Do not quite remember; seen it more than once or twice. [168—29]

Q. Upon those times did you see the iron grating there. A. Yes. I saw the railing open.

Q. What did you see there at the time, the sides opened up? A. Yes.

Q. Both sides or one? A. Both sides.

Q. What do you mean the railing?

A. The sides were up.

Q. Were there any people there? A. Yes.

Q. All of the times that you saw this grating open? A. Yes.

Q. When you saw the grating open just how do you mean? A. Well, standing straight.

Q. You said that during the three weeks that you were in bed that there were times that you walked around the house? A. Yes.

Q. About how many times?

A. When I go around the parlor and go back to bed.

Q. And how often? A. A few times a day.

Q. Will you state whether or not it was in response to natural demands? Know what I mean? When you had to go to the toilet? A. Yes.

Q. Would you get up at any other times?

(Testimony of Margaret Fraga.)

A. To go to the kitchen to get a drink of water.

[169—30]

Q. You will show that rubber band on your knee to the jury?

(Showing of rubber band by witness to the jury.)

Q. (By Judge STANLEY.) That rubber band is a tight band? A. Yes.

Q. (By Mr. RUSSELL.) It is,—it fits quite tightly around the knee? A. Yes.

That is all.

No recross-examination by defense.

**Testimony of Alfred E. Souza, for Plaintiff.**

Swearing in of witness by Clerk of the Court:

Q. What is your name?

A. Alfred E. Souza.

(Examination of Witness by Mr. RUSSELL.)

Q. What is your occupation?

A. Bookkeeper and X-ray operator.

Q. And you are X-ray operator for whom?

A. L. L. Sexton.

Q. How long have been employed as X-ray operator? A. Five years.

Q. And that is since Dr. Sexton first installed the X-ray machine? A. Yes.

Withdrawing of witness Alfred E. Souza, and recalling of witness Margaret Fraga for recross-examination by Judge STANLEY.

**Testimony of Margaret Fraga, in Her Own Behalf  
(Recalled—Recross-examination).**

(Examination by Judge STANLEY.)

Q. Margaret, you said to Mr. Russell that you had [170—31] been to Dr. Sexton's office twice in order to get an X-ray picture taken? A. Yes.

Q. You have told us about your pains in the knee? A. Yes.

Q. You said also that Mr. Souza took the X-ray pictures? A. Yes.

Q. Do you remember talking to Mr. Souza on the second visit as to whether you had any pains or not? Do you remember telling Mr. Souza at that time when you went there the second time that you had not had any more trouble?

A. I do not—it may be or may not be.

**Testimony of Alfred E. Souza, for Plaintiff (Recalled).**

(Continuation of Examination by Mr. RUSSELL of Witness ALFRED E. SOUZA.)

Q. You take the photographs that are taken by the instrument of Dr. Sexton? A. I do.

Q. And you develop them? A. I do.

Q. These photographs are taken for other physicians and surgeons? A. Yes.

Q. Do you know whether in the course of practice of other physicians and surgeons they act upon the photographs that are taken by you?

A. I do. [171—32]



(Testimony of Alfred E. Souza.)

Q. Do you recall having taken an X-ray photograph of the left leg of Margaret Fraga?

A. I do.

Q. How many times?

A. She was there three times.

Q. And do you know the date of the first time?

A. September 4th.

Q. I will show you an X-ray photograph plate upon which there is noted a memorandum "Margaret Fraga, September 20, 1920," and ask you if that is one of the photographs, plates, taken by you at that time?      A. That is one of them.

Q. And I will show you a print and will ask you if that is a print developed from that plate?

A. It is not.

Q. Another one, and if that is the one?

A. That is one of this plate.

Q. Do you recall at whose request these were taken?

A. That first plate was taken at the request of Dr. Osorio.

The plate and print referred to, offered in evidence by Mr. Russell; no objection by Judge Stanley; marked Plaintiff's Exhibits "B" and "C."

Mr. RUSSELL.—That is the plate upon which is noted the name "Margaret Fraga, dated September 4th, 1920, be exhibit 'B' and the photograph marked exhibit 'C.' "

Q. I show you a print upon which there appears the name of some sort, the words "Dr. L. L. Sexton" underneath which the number "2945" and will ask

(Testimony of Alfred E. Souza.)

you if that was a photograph taken by you of Miss Fraga's knee? A. That was. [172—33]

Q. Remember when that was taken?

A. March 4th, 1921.

Mr. RUSSELL.—I offer this plate in evidence.

Judge STANLEY.—No objection.

Judge THOMPSON.—May be so admitted and marked Plaintiff's Exhibit "D."

Mr. RUSSELL.—There are two of them. Can refer to them as two exhibits. The plate upon which is shown the name L. L. Sexton as Plaintiff's Exhibit "D" and the plate on the opposite side of the sheet, be indicated as Plaintiff's Exhibit "E."

(Continuation of Examination by Mr. RUSSELL of Witness ALFRED SOUZA.)

Q. I will show you a print and will ask you if that is a print made from the plate, Plaintiff's Exhibit "D," March 4th plate? A. It is.

Q. And I will offer that in evidence and marked Plaintiff's Exhibit "F."

Judge THOMPSON.—It may be admitted and so marked.

Q. I will show you another print. We will ask you if that is a print taken from Plaintiff's Exhibit "E"? A. It is.

Mr. RUSSELL.—I will offer that in evidence to be marked Plaintiff's Exhibit "G."

Q. Now, I show you the sheet containing the prints, Plaintiff's Exhibit "D" and "E"; were they taken on the same day? A. Yes

(Testimony of Alfred E. Souza.)

Q. March 4th.      A. March 4th, 1921. [173—34]

Q. You say that you took a third picture?

A. Three times.

Q. When was the last time?

A. The last time was March 4th. Last time September 4th.

Q. And she was there September 9th. Was there a plate taken on September 9th?

A. A picture of her back.

Q. The pictures of her leg were taken only on September 4th and March 4th.

Cross-examination of Witness ALFRED SOUZA  
by Judge STANLEY.

Q. Mr. Souza, if it became necessary in the trial to take a picture of both knees of the plaintiff, how long a time could that be done?

A. Be about an hour, to have the plates taken and developed.

Q. These exhibits "D," "G," and "F" are plates taken of the plaintiff's knee and leg?

A. They are.

Q. And which knee?      A. Left knee.

Q. Can you say that they were taken at the same or different angles?

A. The second one a little different angle; from the first one from the exhibit "D."

Q. And the third one—what do you say in regard to same? [174—35]

A. I could not say unless I took a picture. One of these pictures is a side view and the other—this one is Exhibit "D," first one.

(Testimony of Alfred E. Souza.)

Q. I was referring to "G," this one?

A. That is just the front view. Posterior view.

Q. Now this is a totally different picture?

A. Yes.

Q. This is Exhibit "B"; Exhibit "D" is anterior and posterior view, and Exhibit "E," that is a side view; that is, taken at different angles from "G." Exhibits "B" and "E" are both side views? A. They are.

Q. But at different angles?

A. Entirely different.

Q. You say the plaintiff, the girl, went to the office on three occasions? A. Three occasions.

Q. Had you any talk with her on the last occasion? A. Yes.

Q. And what was the conversation?

Mr. RUSSELL.—I object, if your Honor please, that it is not proper cross-examination, and all that the witness was called for was to testify to some mechanical work that the witness did, and if there are any questions that counsel would like to ask, I should think that the defendant should call him as its own witness.

Judge STANLEY.—We submit if the Court please, it is proper that the plaintiff being there, that this witness tell what the plaintiff said there at that time. It is certainly admissible. [175—36]

Mr. RUSSELL.—I brought him here for the purpose of testifying as to the printing of the X-ray pictures and no conversation that he had with the plaintiff; and in the direct examination I only

(Testimony of William G. Souza.)

asked him pertaining to the matter of these prints and I submit, if the Court please—

Judge THOMPSON.—In your examination of Miss Fraga I believe you asked her if she had a conversation with Mr. Souza, and I think she said yes.

Judge STANLEY.—The question was asked her whether she made any statements at that time. Her answer was she might have made them and she might not.

Mr. RUSSELL.—At the present time they have no right when he is my witness to—we did not question this witness whether he had any conversation with the plaintiff and they have no right to cross-examine him concerning this.

Judge THOMPSON.—The Court sustains the objection.

Judge STANLEY.—Note an exception.

(Continuation of Examination by Judge STANLEY.)

Q. Did you at that time have any conversation with the plaintiff as to whether she was having pains or not?

Mr. RUSSELL.—Same objection.

Judge THOMPSON.—Objection sustained.

Judge STANLEY.—Note an exception.

### **Testimony of William G. Souza, for Plaintiff.**

Swearing of witness by Clerk of the Court:

Q. What is your name?

A. William G. Souza.



(Testimony of William G. Souza.)

Direct Examination of Witness by Mr. RUSSELL. [176—37]

Q. What is your name?

A. William G. Souza.

Q. You are employed by whom?

A. Hilo Stationery Company.

Q. Where were you employed last August?

A. Hoffschlaeger & Company.

Q. How long were you in their employ?

A. Six years, four months.

Q. Since when did you leave them?

A. Last day of December, last year.

Q. Do you remember the occasion of Miss Fraga's accident there? A. I do.

Q. Were you working for Hoffschlaeger & Company at the time? A. I was.

Q. In what capacity? What was your work?

A. Shipping clerk.

Q. Just before the accident,—rather, did you have any work in connection with the loading of freight there? A. I had.

Q. State just what you did?

A. I gave orders to the boy to get some freight at that moment, because the truck was to come to get the freight in a few minutes.

Q. At the time of the accident there was a truck coming to get some freight from there? A. Yes.

Q. The freight was from Hoffschlaeger Company and it was to be shipped out?

A. Yes, to be shipped out. [177—38]

Q. It was under your charge?



(Testimony of William G. Souza.)

A. Under my charge.

Q. Did you see Miss Fraga fall through the shaft? A. I did.

Q. Will you state—describe the opening? Just how was it opened. Towards the street both directions? I will show you a photograph and will ask you if that is the manner in which that opening appeared at the time Miss Fraga fell in?

A. Just as it is there.

(Photograph of grating admitted in evidence; no objection by defense, and marked Plaintiff's Exhibit "H.")

Q. What was the occasion of the grating being opened at that time?

A. Put up for some freight?

Q. Where were you at the time it was opened?

A. I was inside.

Q. Did you know Margaret Fraga at that time?

A. I did not know her. Did not recognize her.

Q. Did you know who she was?

A. I know who she was.

Q. Where were you at the time she fell in?

A. At the door outside leaving the main sidewalk the other side of the door.

Q. The door at the angle?

A. The door inside not even with the sidewalk.

Q. That is you were in the vestibule?

A. Yes.

Q. Now I will show you this photograph, Plaintiff's Exhibit "H" and will ask you if the door appearing there is the one? [178—39]

(Testimony of William G. Souza.)

A. No, the next one.

Q. Hoffschlaeger Company occupy two stores, adjoining? A. Yes.

Q. The elevator referred to is on the Puueo side of the Puueo store of these two? A. Yes.

Q. And you were standing in the doorway of the Waiakea store? A. Yes.

Q. So that you were about how far away from this grating? A. About 20 feet.

Q. And you were standing in the vestibule, were you? A. Yes.

Q. Will you state what you saw? Did you watch her as she passed?

A. I came out to see if the freight was out, in the meantime she passed and she was on the Puueo side of the office. I think she passed—I called, I seen her walking towards Cabrinha store side and I stood there looking toward her direction; she simply walked straight ahead; just before she fell down remember yelling out to her to look out. She did not hear, I know she fell in.

Q. How long after you shouted “look out” was it she fell in? A. One or two steps.

Q. At that time did you notice in what direction Margaret was looking? [179—40]

A. What I remember she was looking straight ahead.

Q. Do you know young Borden? A. I do.

Q. Do you remember having seen him across the street? A. I do.

(Testimony of William G. Souza.)

Q. Do you remember if there was any talk between the two?    A. I don't remember.

Q. This all happened in just a few seconds?

A. I seen Mr. Borden across the street and it must have been a minute time she fell in.

Q. You say a minute you mean the length of time it would take to count slowly sixty—from the time that you first noticed that Margaret was heading for the hole so as to suggest to you to call to her it was only a second or so?

A. Two or three seconds.

Cross-examination of Witness WILLIAM G. SOUZA by Judge STANLEY.

Q. You say you are working now for whom?

A. Hilo Stationery Company.

Q. How long have you been working there?

A. Four months.

Q. You are no longer connected with Hoffschlaeger Co. in any way?    A. No, sir.

Q. Now you told Mr. Russell that this elevator was used for taking up freight and that the grating shown on the photograph was the grating covering the elevator shaft?    A. Yes, sir.  
[180—41]

Q. How often in the day was the elevator used in your time?

A. At times it was not used, sometimes used the whole day long.

Q. (By Mr. RUSSELL.) Half of the grating that was up as shown on the picture, on which side was that?    A. Cabrinha's side.

(Testimony of William G. Souza.)

(Continuation of Cross-examination by Judge STANLEY.)

Q. At times you say it was not used at all—was that the rule or an exception?

A. An exception.

Q. As a general thing, it was used pretty much every day?

A. Not exactly. When we needed it, we used it.

Q. Did you not tell, Mr. Souza, that it was used five or six times every day?

A. All depends, frequently have.

Q. But used every week and most days of every week. A. Most days.

Q. On some days it was used several times a day?

A. Yes.

Q. Now you say that when you first saw the plaintiff that you were in the entrance of the Waiakea store? A. Yes, sir.

Q. Of Hoffschlaeger Company? A. Yes, sir.

Q. There are two doors to Hoffschlaeger's business? A. Yes.

Q. One door being on the Puueo side and near the grating? A. Yes. [181—42]

Q. The Puueo door being shown in the picture offered in evidence as Plaintiff's Exhibit "H"?

A. Yes, sir.

Q. Do I understand that there is a similar door twenty feet away and in the direction of Waiakea? A. Yes, Waiakea side.

Q. And when you saw the plaintiff first you say

(Testimony of William G. Souza.)

she was within a step or two of the opening of the elevator?     A. Yes.

Q. And that you yelled out, but she did not appear to hear you?     A. Yes.

Q. And walked into it?     A. Walked into it.

Q. Why did you not yell out before she made that step?

A. I never thought of any danger then. I thought she was looking where she was going.

Q. Was there anything on the sidewalk between her and the grating which would have prevented seeing that one side of the grating was shut down and the other was open?

A. Nothing at all.

Q. How long is that grating along the sidewalk?

A. When it is closed?

Q. When both gates close?

A. Forty inches.

Q. And each grating being about twenty inches?

A. Yes.

Q. How wide is the grating going from the side of the store to the sidewalk?     A. Four feet.

[182—43]

Q. And do you know how wide the sidewalk is at that place?

A. About eight feet. Between eight and ten feet.

Q. Have you measured it?

A. It was measured, I have forgotten.

Q. Your best judgment is between eight and ten feet?     A. Eight and ten feet.

(Testimony of William G. Souza.)

Q. You say there was nothing whatever to prevent the plaintiff from seeing that the grating was open,—in that one-half of it was open; the other half was on the Puueo side. Was there anything to prevent her from seeing that only one-half of the grating was open if she had used her eyes?

A. I do not think so. No obstruction.

Q. None between the opening? A. None.

Q. And nothing between her and the opening?

A. None.

Q. And I understand you to say in answer to Mr. Russell that you heard no conversation between the plaintiff and anybody on the opposite side of the street, and heard no remarks passed by Mr. Borden to plaintiff before she fell in?

A. I did not.

Q. Mr. Souza, about how high above the street does that grating extend when it is open in that way? A. About seventeen inches.

Q. So that it was a grating which, when open, was plainly visible to anybody walking along and in the immediate vicinity of that shaft? A. Yes.

[183—44]

Q. Was it so that anybody walking along the street say from the Waiakea side of your store could see that it was open?

Mr. RUSSELL.—Objection—really argumentative.

Judge STANLEY.—I submit this is cross-examination.

Judge THOMPSON.—Objection overruled.



(Testimony of William G. Souza.)

A. Anyone could have seen it was up.

Q. It was in plain view to one using their eyes?

A. Yes.

Q. Anyone that paid attention could see that the grating was up?      A. Yes.

Redirect Examination of Witness by Mr.  
RUSSELL.

Q. You said that this grating was twenty inches wide, is that based on your judgment or based upon measurement?      A. We measured it.

Q. Is it not a fact that each grating is twenty-three inches wide?      A. No, twenty inches.

Q. How deep is the elevator shaft when it is at the bottom?

A. Between eight feet and nine feet.

Q. What is the elevator shaft lined with? The walls?

A. The flooring is same, even with the wall.

Q. I mean the sides of the hole? Of the shaft? Rock or wood?      A. Rock. [184—45]

**Testimony of V. E. M. Osorio, for Plaintiff.**

Swearing of witness by Clerk of the Court:

Direct Examination by Mr. RUSSELL.

Q. Your name is V. E. M. Osorio?      A. Yes.

Mr. RUSSELL.—Will there be any objection to these (referring to prints he has in hand) being introduced in evidence at this time?

Judge STANLEY.—None.

Mr. RUSSELL.—The plaintiff offers in evidence

at this time a photograph bearing the number mark 1014 as print of X-ray of plaintiff, portion of left leg.

(Admitted and marked Plaintiff's Exhibit "I," and it is admitted that the same is a photographic print of the X-ray of her left leg.)

Mr. RUSSELL.—We also offer in evidence an X-ray photographic print bearing the number 1015, as a photograph of a portion of plaintiff's left leg.

(Admitted and marked Plaintiff's Exhibit "J.")

Mr. RUSSELL.—Will the defendant admit that it is a photographic print of the X-ray negative? Judge STANLEY.—Yes.

Mr. RUSSELL.—The plaintiff offers in evidence a photographic plate from which were printed the photographs, Plaintiff's Exhibits "I" and "J."

(Admitted and marked Plaintiff's Exhibit "K.")

Mr. RUSSELL.—The plaintiff offers in evidence the photographic print bearing the number 1016 as a photographic print of the plaintiff's right leg.

(No objection, admitted and marked Plaintiff's Exhibit "L.")

Plaintiff offers in evidence a photographic print bearing the number 1017 as a photographic print of plaintiff's right leg. [185—46]

(No objection, admitted and marked Plaintiff's Exhibit "M.")

Plaintiff offers in evidence an X-ray photographic plate from which were developed the prints constituting Plaintiff's Exhibits "L" and "M"; no objection, admitted and marked Plaintiff's Exhibit

(Testimony of V. E. M. Osorio.)

“N.” Made at the office of Dr. L. L. Sexton, May 24, 1921.

(Examination of Witness by Mr. RUSSELL.)

Q. You are Doctor V. E. M. Osorio? A. Yes.

Q. And you are a practicing physician and surgeon in Hilo? A. I am.

Q. How long have you practiced, Doctor?

A. One and one-half years.

Q. That is in Hilo? A. Yes.

Q. And prior to that time?

A. Cleveland, Ohio; and France.

Q. You were practicing in France with the American Expeditionary Forces? A. Yes.

Q. How many years have you practiced?

A. Five years.

Q. You know the plaintiff in this case, Margaret Fraga? A. Yes.

Q. Did you have occasion to attend her last August? A. About that time.

Q. Can you tell as to when you first attended her?

A. During the latter part of the month; don't know what date. [186—47]

Q. What was the occasion of your first attention?

A. She was brought to my office with some injuries.

Q. You were informed that the accident occurred that day? A. Yes, sir.

Q. You made an examination of her? A. Yes.

Q. And do you recall what you found on that occasion?

(Testimony of V. E. M. Osorio.)

A. Some of the ailments and injuries.

Q. You recall just some?     A. Yes.

Q. Will you state what those were?

A. She had an injury to her left knee, and laceration on one of the eyes,—I don't remember whether the right or left; she also complained of her back and her hip.

Q. Do you know whether there were any other injuries?     A. There were some more.

Q. Just what were these others?

A. Abrasion of her arms; don't know which one.

Q. What did you do to relieve her?

A. I gave her first aid in the office and sent her home and told her to go to bed and remain quiet for three or four weeks and that I would call at her house during that time.

Q. And how soon after that did you call?

A. Next day.

Q. Did you make an examination of her then?

A. I made a thorough examination in the office and at her house.

Q. Did you find any other developments there at that time?

A. She was unable to move herself and complained very much of her back, her eye and her leg. [187—48]

Q. Which leg?

A. Left leg especially. She complained of her right leg also.

Q. What did you find in connection with her eye?

A. She had a laceration of the upper eyelid.

(Testimony of V. E. M. Osorio.)

Q. Do you recall whether there was any other part of her head affected in any way?

A. No, I don't remember.

Q. Have you any other data with you which would refresh your recollection? A. Yes.

Q. Will you refer to such data as you have?

A. I would not like to produce it.

Q. It would only be used as a matter of refreshing your memory.

A. I have it here, but I want it back.

Judge STANLEY.—I would like to ask when that was made?

A. Right at the time of the accident.

(Continuation of Examination by Mr. RUSSELL.)

Q. At the time when you first saw the plaintiff?

A. Yes.

Q. All of them made at that time?

A. Yes. That appearing on one side (indicating on one side of card held in hand).

Q. Those on the other side made at the time you made the calls? A. Yes.

Q. Will those items appearing on that card refresh your recollection? A. Yes. [188—49]

Judge STANLEY.—If the Court please, I suggest that he be not allowed to use such documents until his recollection be exhausted.

Mr. RUSSELL.—That is perhaps right. It is a point in the discretion of the Court.

Judge THOMPSON.—Very largely, I think. I don't know of any rules of law, that is, by which



(Testimony of V. E. M. Osorio.)

the Court is supposed to cover; depending on the argument referred to, how intricate, etc.

Judge STANLEY.—Have you with you, Doctor, all the injuries from which the plaintiff was suffering at the time you saw her first visit, and your first visit to the house, that you can now recall without the aid of a memorandum?

A. I cannot, because I made this a year ago.

Q. All of the injuries without the aid of the memorandum? A. I don't know.

Mr. RUSSELL.—Q. That is if certain injuries were suggested to you, you might recall without any memoranda? A. Maybe I could.

(Continuation of Examination by Mr. RUSSELL.)

Q. Do you recall whether there were any scratches on the arms of the plaintiff at the time?

A. That is without reference to the memorandum I could not say. There were abrasions on both arms.

Q. Any bruises? A. That is the same thing.

Q. And bruises on the back? A. Yes.

Q. Will you refer to your memorandum and tell us what injuries you discovered, if those items refresh your recollection; after referring to that go over the whole list? [189—50]

A. Laceration of the left eyelid; left elbow and right arm bruised or abrasions, and also abrasion of the right forearm. Injury to the right hip, and injury to the left hip; strained back; fracture of the epiphysis of bone, left leg; sprained right foot; injury to right knee; abrasion of right and left



(Testimony of V. E. M. Osorio.)

thigh, and I have concussion of the head; it should be contusion.

Judge STANLEY.—That is what you have; the word contusion was meant; and the memoranda should have been contusion and not concussion.

(Continuation Examination by Mr. RUSSELL.)

Q. What was the date of your first examination of her?     A. You mean—

Q. Will that card refresh your memory?

A. August 20th at office.

Q. And you called at the house?

A. August 21st.

Q. When did you call after that?

A. Every day to October 9th.

Q. Did you call at the house every day?

A. Yes.

Q. Do you recall whether or not she went to school?     A. Yes, she did.

Q. You would call there after she would come out of school?     A. Yes.

Q. That is November or October?

A. That is September 9th and not October 9th.

Q. After that did you see her in the office?

A. Yes, I saw her sometimes every other day.

Q. For how long a period? [190—51]

A. Up to the 13th I saw her at the house; up to the 13th of September.

Q. From the 9th to the 13th?

A. Yes. And after the 13th I had her call at the office.

Q. How frequently?

(Testimony of V. E. M. Osorio.)

A. Sometimes every other day; every three days.

Q. When was the last time you had occasion to see her?

A. The last day I had her there; May 15th this year.

Q. And prior to May 15th did she call at your office?

A. Sometimes once a week, during the month of April I had her come three times; month of May just twice when she needed medicine.

Q. Then before April, how often?

A. Month of November, I had her four times; month of December, twice; month of January twice; February, likewise. March I had her three times and April three times.

Q. After you first began to call on her, after August 21st, will you state to *the tell* us what you prescribed and what you did?

A. I had the patient put to bed and her leg properly bandaged and demanded from the folks that she be left quiet in bed, with as little motion as possible.

Q. Did you administer any medicine?

A. Not necessarily, just medicine to soothe the nerves.

Q. Did you find any nervous condition?

A. She was somewhat nervous.

Q. And what was done, if anything, to her leg?

A. I had her kept in bed for a while and advised the folks to have an X-ray taken when she was a little better.

(Testimony of V. E. M. Osorio.)

Q. Was there an X-ray taken? [191—52]

A. Yes.

Q. I will show you Plaintiff's Exhibit "B," and will ask you if that is the photograph first taken?

A. Yes, sir.

Q. I will show you Plaintiff's Exhibit "C," is that a print from the photographic plate marked "B"?

A. This is somewhat indistinct; I would like to see the plate; the plate shows up more clearly than the print does. (Is handed plate.) Yes.

Q. That is when placed against the light?

A. Yes.

Q. Did you discover any particular condition as the result of the photograph?

A. I noticed a separation at the epiphyseal end of the bone from the main shaft.

Q. Doctor, until I came into this case, I did not know what that word was. Is that upper part of the bone separated from the main bone by cartilage substance?

A. Not a complete separation, until a certain number of years; it finally unites forming the main shaft.

Q. Doctor, will you turn to the jury and explain to them?

(Witness explains.) We have the two bones. This is the epiphyseal line. This bone is developed into and is separated from this main bone with a little cartilage and as the child develops, this line is softer,—hardens and the cartilage be-

(Testimony of V. E. M. Osorio.)

comes bone and this epiphyseal line disappears and the main bone is made, and the same thing appears up here. (Witness had during this explanation the print "C.")

Q. What was the condition that you found?

A. I found that the anterior of the epiphysis was somewhat separated from the main bone and from that part of the epiphysis. [192—53]

Q. Will Plaintiff's Exhibit "C" disclose that separation?

A. Yes. Right here (indicating). Marked with an arrow; about  $1/8$  inch from the main shaft and the epiphysis separation.

(Witness shows to the jury and explains.) This is the main shaft or main bone. This is the epiphysis separated by cartilage. The epiphysis, this part, is separated from the main bone by a distance of  $1/8$ " which extends to about  $1/2$ " inward. This is the main bone, this black dot. This is cartilage.

Mr. RUSSELL.—I wish to pass this around to the jury, the plate from which the print was taken. Will counsel consent that I make an arrow?

Judge STANLEY.—Prefer that the witness make the mark himself.

Q. Doctor, will you please indicate on this photograph by an arrow the spot concerning which you just testified?

A. After,—used a good deal and smudged up (referring to print). (Witness indicates on print in ink the locality.)

Q. Do you recall that this photograph concern-

(Testimony of V. E. M. Osorio.)

ing which you just testified, Doctor, was taken in September?

A. Yes, some time in September; I do not know the date.

Judge STANLEY.—We will admit that it was taken on September 4th.

Q. Do you recall that subsequently, on March 4th, of this year, there was another photograph taken? A. Some time in that month.

Q. I will show you Plaintiff's Exhibit "G" and ask if you recall if that is the photograph of the plate taken on March 4th? Also show you Plaintiff's Exhibit "E." A. Yes, sir. [193—54]

Q. And will ask you if that condition existed at that time?

A. This picture is somewhat in a little different angle, and shows some part of it. Different from the one already shown.

Q. So that it would show part of it?

A. Yes. Very indistinct.

Q. Can you tell from that picture as to whether or not the condition of the bone was improved?

A. To me it does look slightly improved.

Q. I will show you Plaintiff's Exhibit "D" and will ask you if you can tell anything from that?

A. No, sir.

Q. Is there any reason why you could not?

A. That is an anterior and posterior position.

Q. This is an anterior and posterior picture?

A. Yes.



(Testimony of V. E. M. Osorio.)

(Mr. Russell submits Plaintiff's Exhibit "D" to the jury.)

Q. Doctor, were *were* some photographs taken yesterday, have you seen those photographs?

A. I have not.

Q. I will show you Plaintiff's Exhibit "I" and Plaintiff's Exhibit "J," which are photographs of the left leg and the knee we have reference to, and will ask you if the condition, and also the plate from which that was taken "K," and will ask you if the condition which you testified to appears there?

A. These are very distinctly—the injury more marked than any of the other pictures. The separation is more marked.

Q. In regard to both of them?

A. I have more reference to Plaintiff's Exhibit "I." [194—55]

Q. Will you point out to the jury the particular separation there, on that?

A. This right here (indicating).

Judge STANLEY.—I notice that the witness says the "separation here"; that has absolutely no meaning when it goes on the record.

Mr. RUSSELL.—I was going to ask him to have, to indicate by an arrow, in a way so that it can be identified and ascertained, so that it can go into the record.

(Witness indicates location by arrow mark, and explains.) Where this arrow points shows you the



(Testimony of V. E. M. Osorio.)

separation from the epiphysis more distinct than in the other picture.

Q. The print that you just showed to the jury is taken from the plate marked 1014? A. 1014, yes.

Q. I will ask the jury to see the plate, the one on this side (indicating).

Q. Now, Doctor, I will show you Plaintiff's Exhibit "L" and "M," which are photographs of the right knee, and Plaintiff's Exhibit "N," which is the plate from which those photographs are taken?

A. Yes.

Q. And will ask you if there is any separation appearing in those?

A. There is normal separation which exists when your leg is flexed.

Judge THOMPSON.—What do you mean by flexed? A. When your knee is bent.

(Continuation of Examination by Mr. RUSSELL.)

Q. Now, will you take one of these exhibits, "L," of the right knee and I will hand you exhibit "I," which is a photograph of the left knee and will ask you to point out to the jury [195—56] the difference in the two.

A. This is right (indicating). This is left (indicating). There is an increased separation right through. Here is a normal separation right to the bone. Meaning the epiphysis.

Q. Doctor, is that separation of the bone testified to by you likely to produce pain?

A. Somewhat, sir.

Q. A continuous or intermittent pain?

(Testimony of V. E. M. Osorio.)

A. It may be intermittent, more likely.

Q. Do you recall any outward indications of somewhat similar injury in this leg?

A. There was a certain amount of swelling while the child—right after the injury—there was a certain amount of swelling at that knee.

Q. What was the condition that you observed that suggested to you this condition that the photograph subsequently developed?

A. Upon pressure on the knee there she was very sensitive and somewhat swollen so I thought best to take a picture and see how much, if any, of the bone is fractured or injured.

Q. And you spoke of a swelling, for how long a period did you notice that swelling?

A. I don't remember.

Q. Do you recall when you last noticed this swelling?

A. She had swellings off and on from that time—from the time of the injury.

Q. Did you examine her yesterday?

A. Yes, up at Dr. Sexton's office as I was told to do. [196—57]

Q. Did you notice any amount of swelling, below the knee? A. Yes.

Q. To what was that due?

A. She has a rubber band on her leg and I could not say whether it was due to that at that time.

Q. Is the rubber band that she wears something that you prescribed? A. Yes, sir.

Q. How long has she worn that rubber band?

(Testimony of V. E. M. Osorio.)

A. I don't know, about two or three months.

Q. Prior to her wearing the rubber band, did she have any swelling?     A. Yes, she did.

Q. Did she complain of pains?

Judge STANLEY.—I object, if the Court please.

Mr. RUSSELL.—Question withdrawn.

Q. Are you able to state, Doctor, as to the probabilities of the duration of this condition?

A. Well, they may continue until the bone is completely formed.

Q. Which would be about how long?

A. Between the age of 20 and 25.

Q. And in your opinion will it be cured then?

A. I think it will be. That is to a certain extent, not a complete cure.

Q. You can't state anything certain about it?

A. No, sir; bone is very uncertain.

Q. Has the plaintiff complained at all with reference [197—58] to her ability to walk?

Judge STANLEY.—I object to—

Mr. RUSSELL.—Question withdrawn; objection well taken.

Q. From your opinion what would be the natural effect upon her power to walk?

A. Why, especially in flexion; in drawing her leg outward, there would be a catch that is what she complained of.

Judge STANLEY.—We object to the answer, as it is incompetent, irrelevant and—

Judge THOMPSON.—Objection sustained. The jury will disregard the answer to the last question.

(Testimony of V. E. M. Osorio.)

Q. With that condition as you expressed it, it would be apt to be painful?

A. Yes. Yes, sir.

Q. With reference to the condition of her head, just what was that, Doctor?

A. Just more of an injury to the scalp?

Q. Has that been cured? A. Yes.

Q. An injury to the right knee, do you recall what that injury was?

A. She just complained of it.

Judge STANLEY.—I move that that answer be stricken; another statement of what witness has not complained of; unless shown as made at the time of the examination by the doctor.

Mr. RUSSELL.—Question withdrawn.

Q. At the time of the accident, when she was brought to you did she complain of injury to the right knee? A. Yes, sir.

Q. Do you recall whether there was any outward indication? A. Nothing at all. [198—59]

Q. And whatever that condition was it has been cured? A. It has been cured.

Q. As to the sprained right foot?

A. She has never complained of it.

Q. That is, since the first time?

A. Since then.

Q. You are now treating her only for the condition of the left knee, is that right?

A. No, sir.

Q. What other condition?

(Testimony of V. E. M. Osorio.)

A. She continually complains of her back. I have been treating her for that also.

Q. Can you state what condition you find there?

A. I had an X-ray taken, showing nothing at all; all I had been doing was to apply some lotion, liniment.

Q. Would the fact that an X-ray photograph would not show any condition be conclusive upon the question that there was no defect or not?

Judge STANLEY.—I object and ask that that question be stricken from.

Mr. RUSSELL.—Question withdrawn.

Q. You say you have been treating her for her back? A. Yes.

Q. Now, would the fact that an X-ray photograph would show no condition there, abnormal condition, would that mean to you that there is no condition there?

A. Not at all. Does not mean it. Does not show. The X-ray was taken only to show fractures in the bone or certain fractures in the body. [199—60]

Q. As to other conditions it would not show?

A. No.

Q. How long have you been treating her back?

A. Just off and on.

Q. Are you treating her now for anything other than her knee?

A. She complains of her eye and her head.

Judge STANLEY.—We move that this be stricken and that the jury be instructed to disregard, and that the witness be cautioned.



(Testimony of V. E. M. Osorio.)

Mr. RUSSELL.—Question withdrawn and the jury may disregard the answer.

Q. You say you are treating her for her head?

A. I have not been treating her; she complained of her head, I could not find anything.

Q. Are you treating her for anything else other than the knee and the back?

A. Not that I know of.

Q. Doctor will you describe the physiology of this part of the bone which you testified to, with reference to muscles that control the movement of the leg?

A. The particular part which we have reference to—we have the quadriceps femoris, and these muscles forming what we call patella ligamentum forming a tendon which passes over the kneecap and has its intersection at the tuberosity, at the swelling of the bone below the kneecap.

Q. Right at the point of the bone you had reference to? A. Yes.

Q. In a very general way, will you state what experience you have had with reference to fractures of the leg?

A. I was connected with the Corrigan-Makinney Iron Works, Steel Works, Cleveland, Ohio, and had an average of [200—61] three to four cases a day, fractures; also overseas considerable amount of fractures.

Q. How considerable amount? Give us some idea of the number of cases which you have attended.

A. Maybe we have three to four, cannot say, for



(Testimony of V. E. M. Osorio.)

a period of about two months, I cannot remember, this being my share not counting the amount of fractures there.

Q. Did you make observations of the other cases?

A. Yes.

Q. Many of them?      A. Yes, sir.

Q. State approximately how many.

A. I think I saw two hundred fifty to three hundred over there.

Cross-examination of Witness Dr. V. E. M. OS-  
ORIO by Judge STANLEY.

Q. What medical colleges did you attend?

A. University of Louisville, Kentucky.

Q. How old were you when you went there?

A. Twenty-nine.

Q. What had been your business prior to that?

A. Merchant.

Q. Anything else?

A. Prior to that I was in the railroad.

Q. Prior to that?

A. Prior to that I worked with ——— for a month; prior to that I worked for the railroad.

Q. And you worked for a lawyer?

A. I worked for Calsmith for about three months.

Q. How old are you now, Doctor? [201—62]

A. Thirty-four.

Q. When did you go to college?

A. 1912—1913.

Q. Fall of 1912?      A. Yes.

Q. Graduated when?      A. 1916.

Q. What time in 1916?      A. June, 1916.

(Testimony of V. E. M. Osorio.)

Q. Now, subsequent to your graduation where did you practice?

A. I took an internship at St. Lexis Hospital, Cleveland, Ohio.

Q. How long did that internship last?

A. Almost a year.

Q. And where did you practice after that, Doctor?

A. Cleveland, Ohio.

Q. How long? A. About six months.

Q. When did you enter the hospital as an intern?

A. Don't remember the month.

Q. Can you remember the month? A. I don't.

Q. Can you give us approximately the time when you commenced your internship?

A. I think, right after school, July.

Q. When did you quit the internship?

A. I think it was in January or February, I am not sure.

Q. Your best recollection, what month?

A. That is the best I can remember. [202—63]

Q. That would be from six to seven to eight months in internship? A. It is more than that.

Q. From July, 1916, to January or February, 1917, would give you from seven to eight months, would it not?

A. About that—it was longer than that.

Q. Your best recollection you left in January or February? A. I think so.

Q. By intern, you mean what? Serving as a resident doctor at the office? A. Yes.

Q. Getting bedside practice? A. Yes.

(Testimony of V. E. M. Osorio.)

Q. Now, on the termination of your term as intern what did you do?

A. I worked for the Corrigan-Makinney people for a while, in Cleveland, Ohio.

Q. For how long?

A. I think it was up to September.

Q. In what capacity?

A. As assistant surgeon.

Q. And after that?

A. I came to the Islands for a few months, September, 1917; I think I landed here in October.

Q. And where did you practice in the Islands?

A. Hilo, Hawaii.

Q. And how long did you remain in the Islands?

A. I think I remained till May of the following year.

Q. Were you set up in practice yourself at that time? A. Yes. [203—64]

Q. And then you entered the army?

A. No, sir.

Q. What did you do?

A. I returned to the Corrigan-Makinney people in the same capacity until I was called into the army.

Q. What date was that?

A. That was in July, 1918.

Q. And how long in the service?

A. Till September, 1919.

Q. When did you return to the Islands?

A. November of 1919.

Q. And have practiced in Hilo ever since?

(Testimony of V. E. M. Osorio.)

A. Yes.

Q. Now, when you first saw the plaintiff, Margaret Fraga, you found the injuries which you read from the memorandum, by which you refreshed your memory? A. Yes, sir.

Q. The fact is, is it not, Doctor, that all of her injuries which you read to the jury, were, with the possible exception of the back trouble and injury to the left knee, which you say you are now treating, of a minor nature? With the exception of the eye also? A. Pretty bad at the time.

Q. The others then, with the exception of those three were of a minor nature? A. Yes.

Q. Very trivial?

A. I would not say trivial. Some were a little serious at the time.

Q. Will you refer to your memorandum again, Doctor, and tell us those which you, which were of a trifling nature? [204—65]

A. The bruise to the left elbow and right arm and the right forearm; the abrasion to the right and left thigh, and the rest I could not say; they were minor injuries at the time I saw the patient.

Q. Those were the ones? A. They were minor.

Q. They were trivial? A. Yes.

Q. When you speak of abrasion, what do you mean?

A. Where the surface of the skin is injured.

Q. Where the surface is scraped? A. Scraped.

Q. That is, the upper skin?

A. There are five skins.

(Testimony of V. E. M. Osorio.)

Q. And the outer one just scratched? A. Yes.

Q. And that is all? A. Yes.

Q. And those disappeared within one week's time? Trifling injuries ceased to exist?

A. I don't remember; within a few days; may be a week or so.

Q. From a medical standpoint they were not worth talking about?

A. Could not say much about.

Q. Less said about it the better? A. Yes.

Q. Now you say the other injuries don't pass over for about a week or so. Now what injury, outside of the eye, the back, and the left leg, or knee, as you put it, come within the second class?

A. The injuries to both hips. [205—66]

Q. And then?

A. The injury to the right knee and contusion of the head.

Q. And within what time did those pass away?

A. I think within two or three weeks.

Q. So that if they were covered by you in the second class some time shortly, than the second ones would, were over when?

A. The first class lasts the shortest time; the second class lasts two or three weeks.

Q. And that left what?

A. Left the injury to the right eye and the sprained right foot, strained back and the left knee.

Q. And the sprained right foot she never complained after the first day you saw her she was in bed?

(Testimony of V. E. M. Osorio.)

A. Not any more about it. When she started into walk, she complained.

Q. And when did you last hear of it?

A. Three or four months.

Q. As far as you know that is gone?

A. So far as I know, yes.

Q. Tell us what the injury to the right eyelid was?

A. She had a laceration about  $1\frac{1}{2}$ " deep and about  $\frac{3}{4}$ " in length.

Q. That was scarred?

A. I tried not to leave a scar.

Q. And succeeded in? A. I think I did.

Q. You succeeded to the extent that any scar there, is barely noticeable? A. Yes. [206—67]

Q. And would be only noticeable if her eye were shut and you looked for it? A. Yes.

Q. And could only see if she was laying down and her eyes were shut? A. I think so.

Q. It is not a thing that would detract from her beauty? A. I don't think so.

Q. As a bachelor do you know whether it would detract from her beauty?

A. I don't think it would.

Q. Now, Doctor, you have testified that you were only treating her now for her back and her left knee? A. Yes.

Q. You testified that you took an X-ray of her back and that the X-ray disclosed no injury?

A. Yes.



(Testimony of V. E. M. Osorio.)

Q. The specialty of an X-ray is to show up injuries to bones, is it not?     A. To bones, yes.

Q. The fact that the X-ray showed no such injury, would demonstrate there was not any injury to the bone?     A. Yes.

Q. Then for what are you treating the girl's back?

A. For the complaint; for the pain.

Q. What particular part of the back?

A. The lower back, in the lumbar region.

Q. Away from the locality of the bone?

A. Including that. [207—68]

Q. And what treatment are you giving her?

A. All I have been giving her is a liniment.

Q. And I think you testified that you have not been treating her for some little time past?

A. I have been treating it not as often as I have been treating the leg.

Q. Well, for what in a medical term are you treating her back?

A. You can have an injury to the muscle; injury to the tissue, the covering of the bone, not being the bone.

Q. And for what are you treating her?

A. That is what I have explained; to the best of my knowledge to the injury done to the muscle; sprained.

Q. And what are the symptoms?

A. Pain, main symptom.

Q. What symptoms are there there, that outside

(Testimony of V. E. M. Osorio.)

of the fact that the plaintiff complains she has pain?

A. Just when I touch her there it hurts her.

Q. There is nothing to indicate any injury?

A. Outwardly, no.

Q. When did you treat her for this last? For her back?

A. I don't remember now. Don't know whether it was the same day I treated her for her leg.

Q. And that was on what date?

A. The last day for her leg on the 15th of May.

Q. When you say you treated her for her back, what do you mean? Do you mean gave her medicine for it?

A. I gave her medicine; a liniment.

Q. You gave her liniment?

A. She cannot do it herself; the folks have to do it for her. [208—69]

Q. And that is the only thing that you have given her for the complaint in the back? A. Yes.

Q. When was it, Doctor, you took the X-ray of her back?

A. I think it was a few days after I took the other?

Q. September 9th of last year, same time as you took the foot? A. I am not sure.

Q. Now, Doctor, when you saw the girl hurt what did you diagnose as being the condition of her left knee?

A. Why, when she came in she limped a little on

(Testimony of V. E. M. Osorio.)

the left knee, and at the time I touched her it kind of pained her a little; I did not think it serious.

Q. Am I right to say, Doctor, that she limped a little, pained her a little, you did not think anything serious? A. At the time, yes.

Q. You mean that you found out from what she said that her knee pained her a little?

A. I found—I know of my own mind, by touching.

Q. By touching her you found she complained of pain? A. Yes.

Q. What part?

A. The lower part where the tendon passes over the bone.

Q. About 2" is it not, below the knee proper?

A. Not exactly.

Q. I should say about 1¼" below the knee?

A. Yes. Make it about 1" from the joint.

Q. Would it be an inch from the tibia to the joint? From the head of the tibia, and 1" below the head of the tibia? A. Yes. [209—70]

Q. Now, Doctor, did you find anything else at that time on your first examination regarding the left knee, except on touching her at the place you have indicated she complained of a little pain?

A. No, I did not because there was a certain amount of swelling already.

Q. Did you find anything else except on touching the place indicated she complained of pain, and the fact that you noticed that she limped?

A. Just that swelling?

(Testimony of V. E. M. Osorio.)

Q. It was a slight swelling? A. Quite a little.

Q. You say that you did not think it serious at that time?

A. At that time, but I advised her to keep off that foot, to go home immediately and go to bed.

Q. Why did you do that if you did not think it serious?

A. To see if the swelling would subside the next day and tell more about it.

Q. And has the swelling subsided.

A. The swelling remained about the same, and I treated her as an injury of the bone.

Q. And what treatment did you give her?

A. Rest in bed, bandage.

Q. At that time, second time, what did you diagnose the injury?

A. I still thought about the same, not knowing the injury there, I waited a few days.

Q. At that time you did not make any definite diagnosis? A. I did not. [210—71]

Q. When you say the injury was there, but did not know it was fracture, what did you mean?

A. It might mean a bruise. Yes, it might mean a bruise of the periosteum.

Q. What else could it mean besides?

A. It may be the bursitis.

Q. What is that?

A. That is the covering right below the muscle; below the muscle and above.

Q. That means a bruise of the cartilage?

A. No, not necessarily.

(Testimony of V. E. M. Osorio.)

Q. Would those symptoms given, that is pain on touching her, and the fact that she was limping and there was a swelling indicate a bruise of the cartilage?     A. It could indicate that.

Q. Would it be a bruise of the bursis?     A. Yes.

Q. Or the cartilage?     A. Yes.

Q. What was the treatment like in bed?

A. Quiet, and bandage the leg tight.

Q. Bandage with adhesive strap?     A. Yes.

Q. Now, Doctor, when did you make a more definite diagnosis of the injury?

A. I think it was about the fourth day after the injury.

Q. And what was your diagnosis at that time?

A. I thought there was a fracture?

Q. Fracture of what, Doctor? [211—72]

A. Of the bone.

Q. Of what bone are you referring to?

A. The tibia.

Judge THOMPSON.—Which bone is that?

A. Large bone below the knee.

(Continuation of Examination by Judge STANLEY.)

Q. The bone of the leg of an adult has two bones?

A. Yes.

Q. The large bone in front, in my case a small, called the tibia, another bone in the rear to the side called the tubercle?     A. Yes.

Q. Now, what part of the tibia, the main extension, in an adult, from the knee joint down to the ankle, did you diagnose as being fractured?

(Testimony of V. E. M. Osorio.)

A. I took it to be the epiphysis of the bone.

Q. What do you mean by the epiphysis of the bone?

A. By epiphysis, the soft part of the bone, that last part that is formed in an adult, and becomes bone.

Q. Do you mean the extreme upper part of the tibia?

A. No, sir. I want to explain; there are two ends there.

Q. I Understand that there is an epiphysis at each end? A. Yes.

Q. Of the tibia? A. Of all bones.

Q. The upper epiphysis is the extreme end of the bone next to the knee-joint; is that right?

A. Yes, and becomes bone after, the tibia; that is called the epiphysis. [212—73]

Q. Do I understand you, that you diagnosed the injury to this girl as being a fracture to the whole of that epiphysis? A. Yes.

Q. To the whole extension of the epiphysis?

A. Yes.

Q. In a child, is it not true, Doctor, that you have got the epiphysis at each extension of the bone? A. Yes.

Q. That epiphysis itself is bone, is it not?

A. Yes, soft bone.

Q. Bone of only soft nature? A. Yes.

Q. What comes next, immediately below the epiphysis? A. Cartilage.

Q. And immediately below the cartilage?



(Testimony of V. E. M. Osorio.)

A. Is the hard bone.

Q. So this cartilage joins the epiphysis, which is bone, to the shaft of the bone? A. Yes.

Q. And what is that cartilage which separates the epiphysis from the shaft, called?

A. Cartilage.

Q. Is it not called the epiphyseal cartilage?

A. Yes.

Q. In an X-ray picture, Doctor, it is shown and indicated as the epiphyseal line? And in an X-ray plate does that line appear lighter or darker than the bone? A. Lighter.

Q. Lighter, and the bone appears dark in the plate? A. Yes. [213—74]

Q. And it is the opposite in the print? A. Yes.

Q. Now, Doctor, I will show you exhibit "C," which is a print of the first plate we took on September 4th, and ask you to state whether or not that shows the upper epiphyseal line.

A. Yes, it does.

Q. Could you indicate down here please, where it commences and where it ends?

A. (Witness takes print.)

Q. Just mark its course with dotted lines?

(Witness marks with dotted line.)

Q. Will you mark, Doctor, anterior end of that line with a letter "A," mark it on the side here; and the other line "B" the right; you have marked is the epiphyseal line of separation, separating the upper epiphysis from the shaft of the bone?

A. Yes.

(Testimony of V. E. M. Osorio.)

Q. Would you mind, up there please, just marking "C," being the epiphysis proper?

A. (Witness so marks.)

Q. Is it right, Doctor, will you describe? The epiphyseal line has been from A to B, originally; it should be as now marked by you A to C? I will ask you if the part above the line A to C is the epiphysis? A. A-C is the epiphyseal line.

Q. Is the part above the epiphyseal line, toward the knee-joint, the epiphysis? A. Yes.

Q. There is, Doctor, opposite the letter "A" and in the direction of the arrow on the side of the picture a projection, has that projection any special name? [214—75]

A. That becomes the tuberosity in later life or tubercle, and that tuberosity appears on the picture as a downward shaped projection. (Witness shows the jury part referred to on picture.)

Q. Now, you say in later life that projection shown on the plate become the tubercle or tuberosity? A. Yes.

Q. At what age?

A. Usually from 20 to 25 years the bone is complete, ossified, and that is where the tubercle is, that tubercle becomes united to the shaft.

Q. It becomes united to the boney shaft?

A. Yes.

Q. At the same age in effect that this epiphyseal line, this cartilage along the epiphyseal line, becomes bone and units to the shaft at the same age?

A. Yes.

(Testimony of V. E. M. Osorio.)

Q. So that for the normal leg of a girl of this age, is there anything that separates that projection in later life, the tubercle, from the shaft of the bone?

A. Why, if you have your leg in a certain position, you have a certain amount of separation; for instance, in this picture right at "A," there is a certain amount of separation that is normal.

Q. And, Doctor, from A to C?

A. That is normal.

Q. That is a separation there of the epiphysis from the shaft? A. Yes.

Q. A separation by cartilage, which, as shown in the picture, exhibit "B," is normal? [215—76]

A. Yes.

Q. And by normal you mean in the uninjured condition? A. Yes.

Q. Or in an uninjured condition? A. Yes.

Q. So that the injury which you say is shown in the print "C" and plate "B" extends from where to where?

A. It is ordinarily marked just where the arrow is.

Q. Do you mean then from A down to the end of the projection? A. Yes.

Q. And that is the only fracture, Doctor, which you say is shown by the print and plate?

A. Yes.

Q. Now, Doctor, is that projection or tubercle at the age of thirteen, bone.

A. Soft bone. Being part of the epiphysis.

(Testimony of V. E. M. Osorio.)

Q. Have you had any experience, Doctor, with fractures of this kind?     A. Yes, sir.

Q. Of this kind, a fracture of the epiphysis?

A. Yes.

Q. Would it be correct, Doctor, what you are talking about, being at the extreme end of that projection to call that a fracture or rather separation of the tubercle, rather than a fracture?

A. No, it would be more correct, a separation of the tubercle.

Q. That is its more correct name?     A. Yes.

Q. In this girl's leg, such as you are describing?

A. Yes. [216—77]

Q. A fracture, Doctor, of the epiphysis as it is known to the doctors and surgeons, involves, does it not, a fracture of the main epiphysis?

A. Yes, sir.

Q. When I speak of the epiphysis, that is the body of the epiphysis, above the epiphyseal line and above where letter is in the picture?     A. Yes.

Q. And that is of a much more serious condition?

A. Yes.

Q. Much more serious condition?     A. Yes.

Q. And is an injury which is totally distinct and recognized as totally distinct by surgeons from a separation of the tubercle?     A. Yes.

Q. That is a distinction well recognized by all surgical authorities?     A. Yes.

Q. I will ask you, Doctor, if you did, did you furnish to the counsel in this case, and I am not attempting to violate any professional confidences, the

(Testimony of V. E. M. Osorio.)

description of the injury which is claimed in the complaint?

A. No, I have never had any consultation of the injury. The daughter asked me and I told her just what she had.

Q. Doctor, is there such an animal in the surgical world as a fracture of the epiphyseolysis?

A. No, there is no such fracture.

Q. There might be a fracture of the epiphysis?

A. Of the epiphysis. [217—78]

Q. There might be a fracture of the epiphysis?

A. Yes.

Q. And probably this is what they mean in the complaint? A. Yes.

Q. But as you have testified, Doctor, a fracture of the epiphysis is well recognized in medical authorities as being an injury of a much more severe nature than is indicated in this case?

A. At the time of the injury the fracture of the epiphysis is more serious than the separation of the epiphysis from the bone, but a fracture will nearly always heal by first intention, and while there is a separation of that, as we call it the tubercle will not heal as fast or may not go back to its normal position due to certain amount of traction or extension.

Q. Can you produce, Doctor, any medical authority, or surgical authority which will confirm what you say that a fracture of the epiphysis, that is from A of the epiphysis shown above the line A-C will heal quicker than what you call a separation of the



(Testimony of V. E. M. Osorio.)

tubercle from the bone, from the shaft, that is that portion of the cartilage which lies below the letter "A"?

A. The only authority I can give you is what we have seen.

Q. Do you know of any medical authority, the text-books that will, that you doctors use, written by medical men, that will support that statement?

A. Maybe Albe will. I have not got his book.

Q. You know where it can be obtained?

A. I don't. [218—79]

Q. You have medical works of your own?

A. Yes.

Q. Is it not a fact, Doctor, that all the authorities say that a fracture of the epiphysis is a much more severe injury than this separation of the tubercle from the shaft of the bone?

A. It is severe at times.

Q. Is it not, Doctor, so severe that in many cases it is fatal, a fracture of the epiphysis proper?

A. It can be serious. I do not know of any.

Q. Have you had, Doctor, a case of the fracture of the epiphysis? A. I have not.

Q. Now you say, Doctor, that the injury which you find here, which would not be called a fracture, but a separation, is harder to heal than a fracture of the epiphysis, and your reason for it is that, with regard to the fracture, of the epiphysis, if it heals, or heals at all by first intention, would you mind explaining the healing by first intention?

A. By regular treatment without infection.



(Testimony of V. E. M. Osorio.)

Q. And you mean by that in a state of rest, nature gets busy and heals it? A. Yes.

Q. And the reason why the other injury, the minor injury at the separation of the tubercle may take longer is on account of traction? A. Yes.

Q. By that you mean, do you not, the tubercle is attached to the tendon, the quadriceps femoris, and every time the knee is flexed or extended there is a pull on that tubercle? A. Yes.

Q. And is it not a fact, Doctor, that the treatment for that injury, this separation which you have spoken of is rest? [219—80]

A. Rest and bandage.

Q. I will ask you, if it is not a fact, Doctor, that if the leg is given rest that the process of healing generally takes place within four to five weeks?

A. Three to five weeks.

Q. At what age, Doctor, would you say that that tubercle would appear in an X-ray as of a boney nature, formation?

A. Between twenty and twenty-four. Between those ages it forms in some people.

Q. At twenty to twenty-four it would appear as complete bone? A. Yes.

Q. But at what age would it make its first appearance in an X-ray plate?

A. I do not quite get the question.

Q. The epiphysis from A to C appears almost from birth would it not? A. Yes.

Q. In a plate? A. Yes.

Q. From A to C? A. Yes.

(Testimony of V. E. M. Osorio.)

Q. Would this tubercle appear on the plate at the age of birth? A. I am not sure.

Q. You have never had occasion?

A. Not a small child.

Q. Have you had any occasion before examining this child and having an X-ray taken of her leg to deal with a question of the tubercle and its first appearance, in reference to this question at that age?

A. Well, I have seen pictures at about that age. [220—81]

Q. Is it not a fact, Doctor, at the age of thirteen, this tubercle is of a totally different character, the formation, than the rest of the epiphysis?

A. It is a boney, soft boney substance like the epiphysis.

Q. It is a fact, a much softer part than the epiphysis? A. About the same.

Q. Are you guessing now, Doctor, or are you stating from your opinion?

Mr. RUSSELL.—Object, if the Court please. All questions are asked of the witness must of necessity be of his opinion. He has never seen this bone; the leg has never been opened.

Q. Is it not a fact, Doctor, that this tubercle appears first as boney matter in a child of eleven years old? That up to that time it is more or less cartilage or bone of a very soft nature, and of a distinctly different nature?

A. At the age of thirteen, I told you it was of the same substance as the epiphysis.

(Testimony of V. E. M. Osorio.)

Q. Is it not a fact that it does not appear so different from bone until the age of eleven, that it does appear as bone?     A. Not as bone.

Q. Does not appear as bone of the same consistency, form, as the epiphysis until the fifteenth year?

A. It does appear as the same at the age of thirteen and before that.

Q. How long before that?

A. About the age of ten and twelve.

Q. I think, Doctor, the last question I was examining you on was whether the structure of the tubercle, downward [221—82] projection, tongue shaped, that you have mentioned, was the same as that of the upper epiphysis proper?     A. Yes.

Q. That is true in this case, is it not, because the tubercle has no independent center?     A. Yes.

Q. The plate shows in this case there is no distinct center of ossification for the tubercle?

A. No.

Q. If the plate had shown that there was a distinct center of ossification in the tubercle, then the boney construction of the tubercle would not be what is called the epiphysis proper?     A. Yes.

Q. When I say the epiphysis proper as being one part and the tubercle being another, that is the way two different parts are usually spoken of?

A. Upon the epiphysis is the tubercle, they all combine as the epiphysis.

Q. What I mean is, if medical men were speaking of the fracture of the epiphysis he would speak,

(Testimony of V. E. M. Osorio.)

would he not, of that portion of the epiphysis which is above the line A-C, and would speak as if he were speaking of a fracture? If he means a fracture of that portion of the epiphysis it would be called a fracture of the tubercle, or separation of the epiphysis of the tubercle—the separation of the epiphysis of the tubercle? A. Yes.

Q. If he were speaking of the fracture of the main portion from A to C, that would be a fracture of the epiphysis?

A. If he wanted to localize and speak of an injury, or separation of the tubercle, it is either a fracture of the tubercle or separation of the tubercle. [222—83]

Q. A medical man if he were speaking of a fracture or separation of the epiphysis would mean a fracture of the main portion of the epiphysis, whereas if he were speaking of the fracture of the tubercle, he would say a separation of the epiphysis of the tubercle?

A. We don't usually separate the epiphysis.

Q. And the injury which you claim which you found in this case was a separation of the tubercular end of the epiphysis? A. Yes.

Q. And you have testified, Doctor, that you have never seen a case of a fracture of the epiphysis, using the term as we have agreed upon, the upper portion of the epiphysis as distinguished from the upper end of the tibia end? A. No, I have not.

Q. There is a distinction is there not between a

(Testimony of V. E. M. Osorio.)

fracture of the tubercle and a separation of the epiphysis of the tubercle?     A. Yes, very much.

Q. And what you found in this case was a separation of the epiphysis of the tubercle?     A. Yes.

Q. And not a fracture?     A. Not a fracture.

Q. Normally, Doctor, that tubercle or projection extends downward and almost parallel with the shaft of the bone?     A. Yes.

Q. And by shaft you mean the main bone below the epiphyseal line?     A. Yes. [223—84]

Q. And this tubercle is separated from the shaft by cartilage until about the 20th to 25th year?

A. Yes.

Q. Up to that age the cartilage is gradually becoming bone, is it not?     A. Yes.

Q. And as it in that gradual way becomes bone, the epiphyseal line grows smaller and smaller?

A. Yes.

Q. And it was an injury such as you claim the plates in this case of the girl's left knee show that you were speaking of yesterday, when you said that such an injury heals from three to five weeks?

A. We expect it to heal.

Q. And it is agreed among medical men that it usually heals about that time?

A. It does not. Medical men do not claim that. We expect it to heal in three to five weeks, if it does heal.

Q. What do you mean, Doctor, by the expression you expect it to heal?

A. Well, we expect it to because we figure it to



(Testimony of V. E. M. Osorio.)

be about the same formation as bone; bone takes three to five weeks to heal, we give it the same time to heal.

Q. Have you any authority for that statement?

A. Sajous; Cunningham; Rose and Carton and De Costa.

Q. Have you any of those authorities here?

A. I have Sajous, De Costa, Cunningham, Rose and Carton.

Q. Will you produce those, Doctor?

A. I will have to go home and get them.

Judge STANLEY.—I ask that witness be instructed to go [224—85] home and get them, your Honor.

Judge THOMPSON.—I will take that under advisement; that is intended as a motion; “that witness be instructed to produce them.”

Judge STANLEY.—I now make a motion, if the Court please, that the witness be instructed to produce in court the books of the authors whom he has mentioned so that counsel may have an opportunity of cross-examining the witness on the subject in question.

Judge THOMPSON.—The Court denies the motion.

Judge STANLEY.—I note an exception.

Q. (Judge THOMPSON to Witness.) Are those books counsel called for at his disposal?

A. I can bring them. I have some at the house and some at the office, if at any time he wants to see them.



(Testimony of V. E. M. Osorio.)

Judge STANLEY.—Do I understand that your Honor refuses me permission to have those books produced by the witness, while the witness is on the stand?

Judge THOMPSON.—I have overruled the motion.

Judge STANLEY.—I make this motion if the Court please: I renew my motion, stating as a grounds therefor, that I wish at this time, while the witness is on the stand, to have him read the extracts from those books or refer to the extracts from those books, which cite as authorities for his statements that the injury known as a separation of the epiphysis of the tubercle does not usually heal until the tubercle becomes bone and is united to the shaft of the leg or tibia until from the twentieth to the twenty-fifth year.

Judge THOMPSON.—The Court overrules the motion without comment.

Judge STANLEY.—I note an exception. [225—86]

Mr. RUSSELL.—I am willing to note on the records that counsel may recall the witness if he wants him at any time and ask him what he wishes.

(Continuation of Examination of Witness by Judge STANLEY.)

Q. Now, I will ask you, Doctor, to mark on the print “F” the location of the injury which you say is shown?

A. I would like to have the plate. (Plate “D” handed witness.)

(Testimony of V. E. M. Osorio.)

A. The anterior, posterior does not show the separation.

Q. Have I by mistake handed you the posterior and anterior view? A. You have.

Q. I hand you exhibit "G" and ask if that shows the side view of the leg? A. Yes; yes, sir.

Q. And a print of the plate which was taken on March 4th?

A. Yes, sir. (Witness marks with an arrow the location of the injury.)

Q. You have testified, Doctor, with regard to the plate from which this print exhibit "G" was taken that the print showed that the injury had healed slightly? A. Yes.

Q. Now, Doctor, have you ever had in your practice a case other than this one of the separation of the tubercle end of the epiphysis? A. Yes, sir.

Q. When.

A. In Cleveland, Ohio, 1918, 1917, hospital work. [226—87]

Q. You testified yesterday, Doctor, that the print marked exhibit "C" which was taken from X-ray plate which you had made on September 4th, showed a separation of about one-eighth of an inch? A. Yes.

Q. Do you mean an abnormal separation of one-eighth inch?

A. Almost; yes; almost one-eighth inch.

Q. One-eighth inch more than normal?

A. Yes.

(Testimony of V. E. M. Osorio.)

Q. Will you tell us, Doctor, how you arrived at that opinion?

A. Through past experience of what I have seen and of those conditions, and from the normal leg; X-ray leg we have.

Q. Do you mean that there is such a thing as a normal or standard separation?

A. It is not a separation, it is cartilage.

Q. Do you mean that there is a normal or standard width of cartilage with which you can make a comparison?

A. We have a certain standard; we always figure a certain amount of separation; a certain amount be normal and a certain amount be abnormal.

Q. When you say we figure certain amount normal and a certain amount abnormal, to whom are you referring?

A. Why I am referring to what I have seen in the hospital practice in Cleveland.

Q. And how many cases, Doctor, of this separation of the tubercle end of the epiphysis have you seen in the five years you have qualified?

A. Quite a few, I don't know how many, usually had with school children in Cleveland.

Q. Quite a few, give the jury some idea?

A. Maybe twenty to thirty. [227—88]

Q. When you say we figure on a certain width of cartilage being normal who do you mean by we?

A. Being connected with the hospital, I was not alone at the hospital, the internes all had access

(Testimony of V. E. M. Osorio.)

not only one but four or five; the head surgeon went over the views with me.

Q. Is there any medical writer that speaks of the width of the normal cartilage at the point which you refer to?

A. No writer speaks of normal separation.

Q. No writer gives, makes any mention, does he, as being the normal width of the cartilage separating the tubercle end of the epiphysis from the shaft? A. No.

Q. So that your only standard, by which you can compare the width of the cartilage shown in Plate "B" with the normal width, is what you have seen yourselves?

A. Yes, with the other men, no.

Q. None of whom are here? A. No.

Q. And the plates to which you refer are all away from the Territory? A. Yes.

Q. Is it not a fact, Doctor, that this width of cartilage is so variable even in persons of the same age that no standard has ever been established, or has ever been mentioned, in any of the works of any medical writer?

A. No, unless both legs are taken, then you can find out.

Q. In other words you mean that the variation in the [228—89] width of cartilage at the point we are discussing, is so variable even between persons of the same age that the only way in which one can be sure that there is an abnormal width is to have a picture taken of both legs?

(Testimony of V. E. M. Osorio.)

A. Yes, it is necessary.

Q. And, Doctor, is it not a fact that when you told us that the plates to which were referred to as exhibit "B" showed an abnormal condition of cartilages, being one-eighth inch wider than the normal, you had not seen plates of the right leg of the plaintiff? A. I had not.

Q. Now, is it not a fact that you were undertaking to state from a picture of one leg, that there was an abnormal width of separation?

A. I wish to state that from a sense of touch we can feel that there is a separation.

Q. Touching what?

A. Touching the separation, to see if there was any fracture?

Q. There was no fracture there? A. No.

Q. What could you gain by touching?

A. We would have felt a little elevation to the touch, which could not be felt in the other knee.

Q. Who do you mean we? A. I mean I.

Q. Did you not tell us yesterday, the only indication you found on which you based your diagnosis, were pain and swelling?

A. Yes, at the time of the swelling.

Q. Did you tell us that that was the only indication [229—90] you found at the time you took the picture? Did you not tell us that they were the only indications you found at any time?

A. I don't remember that they were the only indications I found.

Q. On the date you took the picture?



(Testimony of V. E. M. Osorio.)

A. On the date I took the picture I found swelling and pain. I continued to feel to find if anything was wrong with the leg.

Q. Under examination yesterday, is it not true you did not mention that you found anything from the touch? A. The way the question was put.

Q. You deny that the symptoms mentioned, were the only symptoms you found?

A. I do not know the question.

Q. Now, you say you had something else to guide you to find out the abnormal width, that was the sense of touch? A. Yes.

Q. Do you claim now that by putting your finger on the seat or side of the alleged injury that you were able to say that there was an abnormal separation of the cartilage?

A. Able to say there was something there, as it was entirely different from the right leg. Slight elevation there, which upon pressure was more sensitive than the right leg.

Q. Elevation of what, Doctor?

A. Elevation of separation.

Q. How were you able by that sense of touch to say that there was one-eighth inch difference of that cartilage in the separation from the leg that was uninjured?

A. From what I had studied. [230—91]

Q. This separation varies so much even in children of the same age and people of the same age, whether there is nothing abnormal, until you get a



(Testimony of V. E. M. Osorio.)

picture of both legs of the person of the same age, how do you reconcile those statements?

A. When I took that picture and what I found with the sense of touch, showed me that there was a certain amount of separation more than the other?

Q. And that amount was one-eighth of an inch?

A. After I saw the picture.

Q. Will you explain to the jury the picture of one leg, you were able to say that the separation was one-eighth of an inch more than the separation of the cartilage of the leg, of which you had no picture?

A. (Witness shows picture and explains.) This will show you at least here nearly separation of about one-quarter inch, and just above shows you separation of about less than one-eighth of an inch and should be normal separation all the way through.

Q. Will you indicate, if you please, on the print, the place on print "C," the place where you found the separation is about one-quarter of an inch and the place where separation is one-eighth of an inch?

A. Very indistinct.

Q. Will you attempt to mark, will you please do it, Doctor, across that line so as not to interfere?

A. (Marking.) The line marked "G" indicates the place where separation is one-eighth of an inch.

Q. Now, will you indicate by line, where the separation is one-quarter of an inch?

(Witness so marks on print.) [231—92]

(Testimony of V. E. M. Osorio.)

Q. Is it not a fact, Doctor, that the line which you have marked one-quarter inch, is below the end of the tubercle?

A. No, not in this picture. Maybe in the other; it is the best I could do there; the picture is very indistinct.

Q. Is it not below the tubercle?

A. I don't think so, about normal.

Q. Now, do I understand you, Doctor, that at the point which is marked with the line "D," the cartilage is, in your opinion, of normal width?

A. Yes, line "D."

Q. And that the place where the width is abnormal is between the line "G" and the point on the shaft which you have marked with the line and character  $\frac{1}{4}$ "? A. Yes.

Q. So then, Doctor, as I understand you, the space between the point marked with the line "D" and the letter "A" is normal, and it is the place below the point to the line "D" which is abnormal?

A. Naturally as the separation—it will be a little abnormal; it will also have a tendency to make the separation a little wide than usual.

Q. But have you not told us, Doctor, that the point which you have marked with the "D" is normal, is of the width of an  $\frac{1}{8}$ " and is normal?

A. This width normal "D" should be down here and it is not in the normal direction; it should be down here where this separation is.

Q. Now, then, do I understand now, Doctor, that

(Testimony of V. E. M. Osorio.)

you say that at the point which you have marked with the line "D" is not normal?

A. You asked me in a previous question to mark what [232—93] would be normal; I marked not as reference with the bone, but reference to the normal width, the way you wanted it.

Q. Will you so mark this, Doctor, where the abnormal width is, where it begins?

(Witness so marks.)

Q. You have now marked a place with a line, at the end of which is the letter capital "E." So that is the place where you say where the abnormality begins? A. Yes.

Q. So that, Doctor, the portion of the epiphyseal line shown between the lines marked "E" and the point marked "A" on the print is normal?

A. Almost normal. I could not mark every 1/100 of an inch.

Q. It is normal to within 1/100 of an inch?

A. Yes.

Q. You told us yesterday from A on to C is normal? A. Yes.

(Showing of print to the jury by Judge Stanley.)

Q. I hand you, Doctor, Plaintiff's Exhibit "I" and ask you to mark on that print the place where the abnormality begins?

A. (Witness so marks.)

Q. The curved line indicates the place where the tubercle is separated from the bone, causing separation there?

(Testimony of V. E. M. Osorio.)

A. The line has to be in a curve to cover the area, from A-B to, and B-G.

Q. Then do I understand that the line A-B and B-G indicates what would be the normal epiphyseal line? A. Yes. [233—94]

Q. And while you are about it will you mark the rest of the epiphyseal line?

A. (Witness so marks.) As far as I can see it.

Q. I know you don't, Doctor, intend a gap between this letter "A" and the line on which is marked "B"?

A. I cannot see the line any further.

Q. But you claim that the epiphyseal in that place should be shown, would run in two different directions?

A. On account of the curvature of the knee. It does not run—this is due to the separation, then the line would continue downward and this part being out, leaves that separation there.

Judge THOMPSON (to Judge STANLEY).—Does this plate purport to be the last one taken?

A. (By Judge STANLEY.)<sup>1</sup> Yes, your Honor.

(Continuation of Examination of witness by Judge STANLEY.)

Q. I will ask you, Doctor, whether or not, as I have mislaid a duplicate of print 1014, print 1015, does not show another picture of the same leg taken at the same time in the same approximate position?

Judge THOMPSON (to Witness).—Need not answer for the reason that you are testifying concerning a plate that has not been exhibited in the Court.

(Testimony of V. E. M. Osorio.)

Judge STANLEY.—Will counsel admit that this print, which I now hand counsel, in truth and in fact, is a similar print, a copy of the print, with the same number 1015 which has been admitted in evidence in this case?

Mr. RUSSELL.—We admit that.

Judge THOMPSON.—Need not answer that, Doctor.

Judge STANLEY.—Does your Honor refuse to allow me—

Judge THOMPSON.—I similarly rule on the question. [234—95]

Judge STANLEY.—I will withdraw the question, and now on the admission of counsel I offer a duplicate of print 1015 which has heretofore been introduced in evidence as Plaintiff's Exhibit "J."

Mr. RUSSELL.—That is object to, as being immaterial and irrelevant.

Judge STANLEY.—I may have to mark the original throughout. I may have to mark the print 1015 which has been offered in evidence in a way which will interfere with the marking which I wish to make; this is another print of the same picture with the same number.

Judge THOMPSON.—Is that all the statement you want to make.

Judge STANLEY.—Yes.

Judge THOMPSON.—The Court rules that it cannot be admitted.

Judge STANLEY.—I note an exception.



(Testimony of V. E. M. Osorio.)

(Continuation of Examination by Judge STANLEY.)

Q. I hand you, Doctor, Plaintiff's Exhibit "J" and ask you to mark, if you will on that print, the epiphyseal line as you say it would run, if normal.

(Witness so marks on print.)

Judge THOMPSON.—Does that purport to be the right or left knee?

Judge STANLEY.—1014 and 1015 are the left knee.

Q. You have drawn two lines, Doctor, one marked A and another marked B, do I understand you that the line which commences at letter "A," and runs over till it meets line marked "B" shows the correct line?

A. Where they both meet as far as I can see of the cartilage. [235—96]

Q. Will you mark above that— Now, I understand, Doctor, the point from C to B is normal and that any abnormality there would begin at the point "C"?

A. I cannot see the rest of the cartilage, so I am not going to mark a thing that I can't see.

Q. Will you mark what, in your best judgment, would be the normal line of the epiphysis from the point C to its extremity?

A. It should run from C to there (indicating).

Q. May I ask you, Doctor, if in the prints 1014 and 1015, you see an improvement in the condition of the injury from what you judge to be the im-



(Testimony of V. E. M. Osorio.)

provement in the leg as shown by the plate which was taken on September 4th?

A. Shows a slight improvement.

Q. To what extent, Doctor?

A. Well, the separation does not seem so great as it was in the other picture, first picture.

Q. An abnormal width being in the first picture, about  $\frac{1}{8}$ ", can you tell us now what, at the date when these pictures 1014 and 1015 were taken, the separation from the normal is?

A. I would like to see the pictures, 1014 and 1015, and the first picture taken. The separation below remains about the same, but above it shows a little.

Q. At the lower end of the tubercle the separation seems to be about the same? A. Yes.

Q. In this direction the separation is less?

A. Yes.

Q. And that is sure indication, is it not, Doctor, that the injury that you complained of, is healing? [236—97]

A. I don't say that it was healing; I don't know whether it would continue.

Q. Does a comparison of the picture "B" with 1014 and 1015 show in your judgment that the injury is healing?

A. It shows the healing at the present time.

Q. 1014 and 1015 were taken on the afternoon of May 23, this year? A. Yes.

Q. Then the pictures show, Doctor, do they not, 1014 and 1015, as compared with picture B, which was taken on September 4th, that the injury you

(Testimony of V. E. M. Osorio.)

claim exists in the Plaintiff's leg had been healing and has healed to some extent?

A. To the present time.

Q. And your comparison of picture "B" with a picture which was taken on March 4th, show that the wound had healed to some extent between those dates? A. Yes, sir.

Q. I ask you, Doctor, if you could tell now from the examination of the plates which were taken on May 23d, how much the abnormal separation amounts to? Comparing it with first picture you said on September 4th,  $\frac{1}{8}$ " abnormality; now the other picture shows, the picture taken on March 4th shows an improvement and the picture taken on May 23d shows improvement, and I asked you what is the abnormality of separation or what are the abnormalities of separation on May 23d?

A. I will have to see the pictures. (Asks for pictures of May 23d.) This is March and September.

The separation in the upper part between the tuberosity and the bone, is decreased, and at the lower part, it was about the same. The examination shows about the same. [237—98]

Q. To what extent did the separation decrease at the upper end?

A. I cannot say just exactly as indicated in the picture.

Q. Now, you were able to tell us, you told the jury that by merely touching you could ascertain that there was an eighth of an inch abnormality on Sep-

(Testimony of V. E. M. Osorio.)

tember 4th. Can you not tell us *us* now when you got this impression?

A. I am telling you what the separation below is. The upper part I did not have. It was the lower part.

Q. Then will you tell us from your sense of touch what was the abnormality in the upper part?

A. I did not try to ascertain that. The lower part where I could feel it.

Q. Now, Doctor, I understand from your testimony is that your first determination of this condition, you found, was to bandage the injured leg with adhesive plaster? A. Yes, sir.

Q. And above and below the knee? A. Yes.

Q. This bandage being tight? A. Yes, sir.

Q. And other than that you used no mechanical appliance at first? A. No, sir.

Q. To keep the leg immobile?

A. We kept it immobile by having pillows on each side *side* of the leg so that the child would not have mobility.

Q. You did not mention that yesterday?

A. That is included in the treatment; we mentioned rest.

Q. Was it in accordance with your instructions that plaintiff was allowed, during the time when she was supposed to be confined to bed, to walk around the house for purposes [238—99] of nature, or for the purpose of getting a drink?

A. They lifted her up and not to walk around.

Q. I am asking you if it was contemplated in

(Testimony of V. E. M. Osorio.)

your treatment that the patient should walk around the house during the time when she was supposed to be laid up?     A. No.

Q. And you continued with this treatment, adhesive plaster bandage, up to about two or three months ago?     A. Yes.

Q. And after the first three weeks the plaintiff was allowed to walk around her house, and yard, and to attend school and walk around the school premises?     A. To walk on the school premises.

Q. So that between the time that school opened early in September, 1920, up to the time when you secured the rubber bandage for her, she was allowed to walk and move about?

A. In school; not anywhere she wanted to go.

Q. And to walk around the house and around the premises on which her house is situated?

A. Yes.

Q. And I will ask you, Doctor, if you expected with or could expect, with that treatment that the injured leg would speedily recover?

A. I do. Not speedily, but slowly.

Q. Is it not a fact, Doctor, that the mere allowing of her to walk around, merely with the adhesive plaster bandage on until the tubercle had come back to its normal position, would retard the recovery?

A. Not necessarily.

Q. Would it ordinarily?     A. No. [239—100]

Q. Would it under any circumstances?

A. No.

(Testimony of V. E. M. Osorio.)

Q. Then what do you mean by saying, not necessarily?

A. For this reason that after separation shows no complete healing at the end of three to four weeks, it is unnecessary to keep the patient in bed for recovery you will not get within that time, it will not surely develop at the end of nine months.

Q. Doctor, if without keeping the girl in bed you had kept her at home and given the leg as much rest as possible would you not expect the recovery to be quicker than in the case of allowing her to walk around?     A. I do not.

Q. Have you any authority, Doctor, to which you can refer, except your own, to the effect that if the injury is not healed within three or four weeks, it is not necessary and will serve no purpose to keep the injured part immobile?

A. I will mention De Costa.

Q. Have you De Costa with you.

A. I have it over at the house.

Q. And when you refer to De Costa, a surgical work published by De Costa, he is supposed to be a surgeon in Jefferson University?     A. Yes.

Q. And if you had De Costa could you refer us to the passage in that work to which you are using in support of your statement?     A. Yes, sir.

Q. (Judge STANLEY.) If the Court please, I now renew my motion that the witness do procure the book to which he has referred, that I may be able. [240—101]



(Testimony of V. E. M. Osorio.)

Judge THOMPSON.—The Court overrules the motion, for the reason that the Court allowed this witness to be questioned and even cross-questioned on his ability as a surgeon, in attempting to disqualify or qualify his statements.

Judge STANLEY.—I note an exception.

Q. When you secured the rubber band and had the plaintiff substitute it for the adhesive plaster bandage, you continued to take no other measures to keep the injured part immobile?

A. Prior to have the rubber band?

Q. After securing the rubber band and substituting it for the plaster?     A. No.

Q. And still allowed the child to walk around her house premises and attend school and walk around the school premises?     A. Yes.

Q. And both the adhesive plaster bandage and the rubber band allowed the plaintiff to flex and extend the leg?

A. The rubber bandage does, the adhesive not so much as far as flexion is concerned.

Q. They both allowed the leg to be extended to about the same degree?     A. Yes.

Q. And they both allowed the plaintiff to flex or bend the knee, but the rubber band allowed that flexion to a greater degree than the adhesive plaster bandage?     A. Yes.

Q. Now, Doctor, what is the chief muscle or muscles which is used in extending the leg?

A. That is the quadriceps femoris. [241—102]

Q. And that is a large powerful muscle?



(Testimony of V. E. M. Osorio.)

A. Yes, sir.

Q. Of the thigh? A. Yes, sir.

Q. And it is really composed, four muscles?

A. Yes.

Q. Which terminates into a tendon? A. Yes.

Q. And at what point in the leg below the knee is that attached?

A. To the tuberosity of the bone by means of the patella ligamentum.

Q. This tendon is known as the patella ligamentum? A. Yes, sir.

Q. And that you say was attached in the plaintiff's case to the portion of her leg which was injured? A. Yes.

Q. Is it not a fact that every time she extended her leg that tendon was pulling on the injured part?

A. We expected that by due counter-irritation to have a certain amount of bone tissue to heal it. With that protection she had on, it prevented a complete usage of that muscle that controls that ligament.

Q. I am not asking you about the complete usage of that muscle. That every time she extended her leg that there was a pulling of her leg?

A. There is a certain amount.

Q. And, Doctor, is that not the fact even when one, owing to the fact of having a bandage on, or tries to walk stiff legged? A. Yes.

Q. Is it not a fact the more the stiff-legged the condition, the greater the tension on the injured part? A. *Well*— [242—103]

(Testimony of V. E. M. Osorio.)

A. Well, there is more tension, yes, on the injured part.

Q. In other words, Doctor, with a stiff leg, made stiff by a bandage, there is greater pulling on the injured part?

A. But the bandage prevents the muscles from moving freely.

Q. You mean the bandage prevents the full force of the muscle being felt on the injured part?

A. Yes.

Q. But allows it to have a certain amount?

A. Yes.

Q. Would it heal quicker with the bandage, or without? A. It would.

Q. What do you mean by that answer?

A. What is meant, it prevents the muscle from performing its natural function, gives a chance for the injury to improve.

Q. By reason of the fact that the bandage preventing this powerful muscle to perform all of its force? A. With all its force.

Q. You don't mean to say, Doctor, that she would get well quicker by being allowed to walk and moving, and having some of the force felt on that muscle, than she would if she had not been allowed to walk?

Judge THOMPSON.—That has been answered three or four times.

Judge STANLEY.—I note an exception.

Judge THOMPSON.—I warn you again you must proceed more rapidly than you have.

(Testimony of V. E. M. Osorio.)

Judge STANLEY.—I have not been speaking more rapidly on account—

Judge THOMPSON.—No use making any more arguments. You know what I mean by it, within the meaning of the Court's orders. [243—104]

Judge STANLEY.—I note an exception.

Q. Now, Doctor, the object a doctor has in view in treating an injury such as you prescribe in the plaintiff's case is to prevent further separation of the tubercle, is it not? A. Yes.

Q. And to allow the tubercle to get back to its former place? A. Yes.

Q. And is it not a fact, Doctor, that every time that the plaintiff extended her leg the action of the quadriceps tendon tends to enlarge that separation and prevent—

Mr. RUSSELL.—I object to that question as it has already been answered.

Judge THOMPSON.—The Court sustains the objection.

Judge STANLEY.—Note an exception.

Q. I will ask you, Doctor, is it not a fact that if you want to guard against any further separation and allow the tubercle to resume its normal position and to allow the patient to recover naturally, you must prevent in some way all action of the muscles on the injured part?

Judge THOMPSON.—Need not answer that.

Judge STANLEY.—Your Honor refused to allow the question? I note an exception.

(Testimony of V. E. M. Osorio.)

Q. I will ask you, Doctor, if it is not recognized by leading medical and surgical authorities that the proper way to keep the leg in such a position that the muscle, quadriceps femoris, will not act on the injured part is to keep the leg, by the use of splints or by a plaster of paris cast, or other cast, immobile up to a certain period.

A. Yes, up to a certain period.

Q. Up to what period? [244—105]

A. Three to four weeks; as high as five weeks.

Q. Do you mean, Doctor, that irrespective of the condition in which the injury may be at the end of three or four weeks, medical authorities and surgeons, discontinue to use splints or casts?

A. In what cases, may I ask?

Q. In cases of injuries of the nature you say the plaintiff had?

A. Up to three or five weeks they do.

Q. Is it not a fact, Doctor, that the leg should not to be taken out of the splints or cast until the bone has healed or is rapidly healing?

A. No, sir.

Judge THOMPSON.—In his evidence there was no mention made of splints having been used, and the Court will ask that you direct your examination on different lines.

Judge STANLEY.—Is it your Honor's ruling that I will not be allowed to examine the witness on the proper practice to be followed in attempting to heal an injury of that kind that the doctor said

(Testimony of V. E. M. Osorio.)

the patient is suffering from. May I ask your Honor to—

Judge THOMPSON.—Judge Stanley, I am not undertaking your case.

Q. I will ask you, Doctor, if, considering your testimony that you knew the nature of the injury to the tubercle both before and after the taking of the X-ray picture of September 4th, the surest and safest method of securing a rapid and complete recovery of the injured portion, would not it be to adopt the use of a splint or cast continually? A. Not necessarily. [245—106]

Q. Will you explain what you mean, not necessarily?

A. In this case, as long as we can place the limb in an immobile position by placing obstructions on either side and having the leg properly bandaged tightly by not having a plaster cast or splints.

Q. Do I understand that if you find at the end of three or four weeks the leg not healed that you can discard this splint or cast?

Judge THOMPSON.—You need not answer that.

Judge STANLEY.—I note an exception, and instructing the witness he is under no necessity to answer the question.

Q. Is it your opinion that if you find at the end of three or four weeks the leg does not heal that you can discard the splints or cast?

Mr. RUSSELL.—I object to the question.

Judge THOMPSON.—Objection sustained.

Judge STANLEY.—I note an exception.



(Testimony of V. E. M. Osorio.)

Q. Do you mean, Doctor, that if the injury has not healed at the end of three or four weeks it would be useless to continue to keep the leg in splints for any further time?

Mr. RUSSELL.—We object to the cross-examination; we have purposely avoided objecting in order that it would not seem as if we were trying to keeping something away, and I think it should be limited. We object upon the ground that defendant has been permitted considerable latitude in the cross-examination of the witness upon the subject-matter embodied in this particular question, and to permit further cross-examination upon this question would be—

Judge THOMPSON.—Objection sustained.

Judge STANLEY.—Note an exception. [246—107]

Q. You stated, Doctor, I think, that the allowing of the plaintiff to extend the, to walk about and extend her injured limb would not delay recovery because you expected by counter-irritation some bone tissue; please explain what you meant.

Judge THOMPSON.—You need not answer the question.

Judge STANLEY.—I note an exception.

Q. Now, Doctor, you have testified that the bandages that you put on or had the plaintiff use were tight? A. Yes.

Q. I will ask you if it is not a fact that the rubber band that she is wearing under your directions is



(Testimony of V. E. M. Osorio.)

not so tight as to make rills or red ridges on the leg? A. Yes.

Q. I ask you if the presence of those red ridges do not indicate that there is an impeding of the flow of blood?

A. It may be tight, at the upper and lower end, and still loose enough for circulation.

Q. Does the presence of those ridges indicate interference of the flow of blood?

A. With the superficial circulation.

Q. Now, you have testified, Doctor, on direct examination that the plaintiff was suffering from time to time from a swelling of the leg; will you tell us on what parts of the injured leg those swellings occurred, or appeared?

A. In the first part of the swelling it was usually over the joint and since she wore the rubber band, why it kind of extends below the joint and there is a certain amount of swelling in the joint itself.

Q. Is there any indication on the plates of any swelling in the joints?

A. No, not on the plates. [247—108]

Q. If there was any infection it would cause swelling? A. No tissues are shown.

Q. If there was any infection would that appear on the plates?

A. Not in the way X-ray is taken. Soft tissues are not taken in X-rays.

Q. I had not been asking about tissues and the doctor has been interpolating same. It does not

(Testimony of V. E. M. Osorio.)

show in the plates? Infection would not show in the plates? A. No.

Q. That in order to have infection you would have to have the plates specially prepared?

A. You would have to have an extension of time in taking the picture.

Q. Do you claim that there is any condition of infection in the plaintiff's knee?

A. A certain amount of swelling, yes.

Q. Caused by what, Doctor?

A. Due to the injury she has there, partially.

Q. In what way, Doctor, caused by the injury?

A. Well, in moving the limb that she has to.

Q. When you said partially did you mean that there was some reason to account for the other part?

A. Why, yes, on account of the pressure of the bandage of the rubber band.

Q. So that, as I understand you now, any swelling that is around there, is caused either by—so that in your opinion any swelling that is present around the knee now is caused in part by the rubber band and in part by the movement of the knee, which she has to make? A. Yes. [248—109]

Q. And when you say movement which she has to make, what do you refer to?

A. To carry on her daily life.

Q. Now, Doctor, having disposed of the swelling of the knee, I will ask you, where else in the leg below the knee have these swellings occurred?

(Testimony of V. E. M. Osorio.)

A. Right below the rubber band.

Q. You mean around the calves?      A. Yes.

Q. Any swelling at the ankles?

A. I did not notice; have not noticed any.

Q. Do you mean did not notice any at any time?

A. Yes.

Q. Now, Doctor, to what in your opinion is that swelling in the neighborhood of the calves of plaintiff due to?

A. Due to pressure of the bandage.

Q. That is, and correct me if I am wrong, Doctor, it is due to the free circulation of the blood being impeded by the bandage?      A. Yes.

Q. And that is the only cause, Doctor, to which you attribute the swelling in the neighborhood of the calf?      A. Yes.

Q. Doctor, you told Mr. Russell that the plaintiff would be liable to suffer pain at the seat of the injury, that you claim, namely, the tubercle, and that pain would be intermittent. What do you mean by that?      A. Off and on.

Q. Occasioned by what, Doctor?

A. Due to the use of her leg; on account of the separation being there, she uses the leg a little, why one day she may have pain, next day may be absent altogether, [249—110] the day following may be there again.

Q. And that pain, Doctor, is caused, is it not, by the pulling of the large muscle of the thigh on the injured part?

(Testimony of V. E. M. Osorio.)

A. Due mostly to that and the use of the injured leg.

Q. It is not due to the action of the muscles when she is walking? A. Partially, yes.

Q. The action of the muscle, I mean the action of the muscles on the injured part? A. Yes.

Q. Is it due to any other cause?

A. Well, it may be due to the—I said due partially to the movement, and partially, well, may be due to the joints because when you move that, the joint is in motion would have some tendency.

Q. It is due to either the pulling of the quadriceps femoris on the injured part or due to other muscles which act on the injured part when she uses the leg in walking? A. Yes.

Q. And is it due to any other cause besides the separation which exists there?

Q. Will you explain how, if she was walking she would have the pain which you describe is caused by the pulling of the muscle on this tubercle?

Judge THOMPSON.—You need not answer that.

Judge STANLEY.—I note an exception to the refusal of his Honor to allow the question.

Q. You testified yesterday, Doctor, did you not, that the plaintiff would not recover from the injury until from the twentieth to twenty-fifth year, and also testified that the cure would not be complete at that time?

A. I said, may not be complete. [250—111]

Q. What would in your opinion prevent the cure being complete at that time?

(Testimony of V. E. M. Osorio.)

A. The injury being so long up to that time may cause a certain amount of deformity there, which we cannot—

Q. Deformity to what, Doctor?

A. The tuberosity.

Q. Do you mean deformity caused by the pulling of the muscle on that muscle?      A. I do not know.

Q. What do you mean?

A. I mean the growth not growing properly as it should as we know; all fractures do not grow the same, just as we expect them to, nature takes care—

Q. Are you giving this as your opinion as to the probable condition in this case; of the injury in this case?      A. It may be often that way.

Q. You understand the use of the word probably and may?      A. Yes.

Q. Are you giving this as your opinion as to the probable result of the injury to the plaintiff?

A. I say it may probably, I cannot say what would happen ten years from now, impossible for anyone to predict anything to happen to a joint ten or twelve years from now.

Q. Then you are merely expressing an opinion as to what under the most adverse circumstances might possibly happen?

A. As far as the deformity of the tubercle.

Q. And by deformity you merely mean, do you, difference in shape from the normal?

A. Something that may prevent her from having the proper usage of that leg.



(Testimony of V. E. M. Osorio.)

Q. Is it not a fact that the continuous use of that [251—112] leg now with the quadriceps extension working on the injury is a—prevents its recovery until it is given a chance to rest?

A. Not the way it is being treated at the present.

Q. So you claim that the way it is being treated at present, the plaintiff being allowed to walk on it and to use the muscle on the injured part—

Judge THOMPSON.—You need not answer that.

Judge STANLEY.—Exception noted.

Q. I will ask you, Doctor, the Court having, and I say this respectfully, having curtailed my right, as his Honor thought proper, to examine you further on the question of treatment of an injury such as you say exists here, by the use of splints and casts, if it is not a fact that according to the most modern notions of surgery, that instead of using a splint or cast, which is still recognized as proper, that some appliance is used which will prevent the play of the muscle on the injured part?

Mr. RUSSELL.—That is objected to.

Judge THOMPSON.—I want the record to show that I have not curtailed any witness, and the remarks made by the attorney were highly improper. Objection sustained.

Judge STANLEY.—I note an exception. I have never been disrespectful to any Court in my twenty-five years of practice.

Judge THOMPSON.—It is all past now.

Q. I will ask you if leaving aside the question of the use of splints or casts, it is not recognized



(Testimony of V. E. M. Osorio.)

by medical authorities as correct practice to keep the muscles which affect a pull upon, from acting upon that part when it is injured?

A. That was done by me through the adhesive plaster, and the rubber band. [252—113]

Q. Have you not told us, Doctor, that the adhesive bandage and the rubber bandage still allows the action on the injured part?

A. Partial.

Q. I will ask you again if it is not a fact that according to modern surgery it is considered necessary to keep the muscles which play upon a part from acting upon that part, when it is injured?

A. No, sir.

Q. Is it not a fact, Doctor, that an injured leg, has up to date, and was during the time of your service in the expeditionary forces, kept in a sling or hammock so that the muscles affecting the injured part would not play upon it?

Judge THOMPSON.—You need not answer that question.

Q. (By Judge THOMPSON.) Doctor, have you given this girl such treatment as your experience, your ability, and medical science would dictate, under all circumstances? A. I have.

Judge STANLEY.—I note an exception to the question of the Court, on the ground that it does not call for the standard of treatment which the law requires, and that the witness can describe a treatment or give his conclusions.

Judge THOMPSON.—Proceed.

(Testimony of V. E. M. Osorio.)

Judge STANLEY.—I offer to examine the witness further along the lines last touched on, by me, to the effect and to elicit from him if I can, that, in accordance with modern surgery, an injured part is hung in a hammock or some other contrivance which has the same effect as a splint or cast would have, that is of keeping the muscles controlling or acting continually on a part, from acting on that part when it is injured, at the same time allowing the part which is not injured free action and motion.

A. We have always done that. That is not a modern [253—114] theory but an old theory.

Q. It has always been the theory of keeping the muscles from acting in certain cases?

A. I do not know what you have reference to. You were talking about the leg.

Q. In what way do I make myself unintelligible? In what case is that done?

A. For instance in fracture cases, we try to get as much mobility as possible.

Q. And how do you effect that object?

A. Well, we have different ways of doing it. We can do it with splints; we can do it with the plaster cast; we can do it with the pillow splint.

Q. And by pillow splints, putting pillows on either side? A. Yes.

Q. You fastened the pillows around the leg?

A. No.

Q. You spoke of the use of pillows in bed?

A. One on each side to prevent motion in bed.

(Testimony of V. E. M. Osorio.)

Q. Would that completely prevent motion in the leg?     A. Most of it.

Q. As long as the pillows were kept in position?

A. Yes.

Judge STANLEY.—I now renew my motion, if the Court please, that the Court instruct the witness to produce the authorities which he enumerated as supporting the position taken by him.

Judge THOMPSON.—The Court overrules the motion.

Judge STANLEY.—I note an exception.

Q. You referred, Doctor, yesterday to a kinky condition which would cause pain? [254—115]

A. Yes.

Q. Will you explain that?

A. I mean that separation there would cause a sort of a spreading which would cause a certain amount of pain.

Q. Do you mean when the plaintiff exercised her leg in walking?

A. In walking or in making certain movements.

Q. By walking or making certain movements of the leg, by which the quadriceps femoris would be acting on the tubercle?     A. Yes.

Redirect Examination of Witness by Mr. RUSSELL.

Q. Doctor, you just stated that the theory of so supporting the injured leg in all cases as to prevent mobility, is an old theory and not new. What is the new theory?

(Testimony of V. E. M. Osorio.)

A. The new theory as is used during the overseas was to have mobility of the joint and to that effect, instead of immobility at the joint. De Page started the theory of mobility of the joint and we used it in our army as well as the French, and we found out that we had very good results.

Q. That pertains to the joints? A. Yes.

Q. And did you follow that practice yourself?

A. Yes, I did, with success. I have a case at the hospital now, pertaining to the leg.

Q. That applies to fractures?

A. Yes. That is the same; we splinted the leg for a certain period, three to four weeks, after than we took the splints off and put on the bandage.  
[255—116]

Q. Who did you say this fellow is?

A. De Page.

Q. Doctor, what would have been the natural results to the plaintiff if she had remained in bed for a period of months, with her leg immobile, not having been used to it?

A. We would have had acute ankylosis. Stiffening of the joint, and there would have been a certain amount of atrophy of the muscles, for instances, for instance the arms and the legs.

Q. And if that had been done there would or not, or would have been that counter-irritation that was advisable?

Judge STANLEY.—I object to the question as the witness has not testified concerning counter-irritation. The witness has not—

(Testimony of V. E. M. Osorio.)

Judge THOMPSON.—Motion overruled.

Judge STANLEY.—I note an exception.

Q. You just mentioned ankylosis might result; stiffening of the joint, due to failure of the usage of the limb; is that a condition that would be permanent depending on the period?

A. You would have complete ankylosis there, for which nothing can be done.

Q. Doctor, yesterday there was a distinction brought out between the separation of the tubercle or the partial separation of the epiphysis and the fracture of the epiphysis, and in that connection you said that there was a distinct difference in medical technical terms. I will ask you whether in the ordinary acceptance of the term even in this proposition, if there is any difference?

A. We always classify separation under fractures in common usage among the doctors, we call it fracture, although it is a separation. [256—117]

Q. (By Judge STANLEY.) Do you mean, Doctor, that fractures is a general term, which may include separations and fractures?

A. Included under that heading.

(Continuation of Redirect Examination by Mr. RUSSELL.)

Q. Doctor, you spoke of practice with a certain firm in Cleveland, as Assistant Surgeon, what is the name of that firm?

A. Corrigan-Makinney Steel Works.

Q. Will you describe this steel works?



(Testimony of V. E. M. Osorio.)

A. Corrigan-Makinney is one of the largest steel firms in Cleveland, employs five or six thousand men, staff doctors, who take care of the employees and have their own hospital.

Q. Takes care of its surgical and medical cases exclusively?

A. No medical. Only surgical.

Q. Doctor, you spoke of authorities mentioning Sajous, Cunningham, De Costa, etc., upon the proposition that if the healing of an injury such as plaintiff has suffered would not be affected from three to five weeks that you cannot expect a recovery until after some years; will ask you as to whether you know that Keene is also an authority upon that? A. Yes, sir.

Q. Have you read Keene in that connection?

A. No, not for quite a while.

Q. Have you looked that up in Keene?

A. I have not. I have Keene's works in more than one volume.

Q. Are there more than one volume?

A. I think eight volumes.

Q. It is a standard authority? A. It is.

Q. Do you recognize this book, showing you Volume II, [257—118] Bones, Fractures, Discoloration, as one of the volumes of the authorities you speak? A. Yes, sir.

Q. That is not your book, is it? A. No, sir.

Q. Will you see if you can find anything? (Hands the witness book in question.)



(Testimony of V. E. M. Osorio.)

Judge THOMPSON.—Cannot do that on re-direct examination.

Judge STANLEY.—You have stated, Doctor, that Keene's works support your statement that if healing is not effected within three or four weeks, you cannot expect a recovery for some years?

A. It was another authority I cited.

Q. You have cited Keene's works on surgery as being an authority for the proposition that if the healing of an injury such as you say plaintiff suffered on August 20th, was not effected within three to four weeks, it would not heal for years; will you please turn to the passage in Keene to which you have reference?

Judge THOMPSON.—Shakes his head (indicating he would not allow the question).

Judge STANLEY.—Your Honor refuses to allow it?

Judge THOMPSON.—Getting beyond the rules of evidence.

Judge STANLEY.—I note an exception.

(Continuation of Redirect Examination by Mr. STANLEY.)

Q. You say, Doctor, that the modern theory in regard to the treatment of fractures is to have mobility of joint, and to have the patient use the leg. Do you mean that according to modern authorities the patient is allowed to exercise the muscles that affect the part while the part is injured? A. Are you referring to the joint?

(Testimony of V. E. M. Osorio.)

Q. I am asking you, Doctor, if according to modern [258—119] authorities the patient is allowed to exercise the joint, if it involves the action by him of the muscles on the affected part?

A. We use mobility. We allow patient to have mobility of that joint.

Q. Is it not a fact that according to modern surgery that the patient, assuming the knee to be fractured, is not allowed to move the leg, but that the joint is manipulated by a doctor or other person in such a way as to prevent the patient exercising the muscle?

A. He has mobility there.

Q. I am asking if the leg is not manipulated by the doctor or other person, nurse?

A. Well, yes, patient cannot handle the leg himself. That is unexpected. The doctor or the nurse, naturally.

Q. The doctor or the nurse moves the joint back and forth, but does not allow the strain on the muscle, or the muscle to move?

A. Not for the first few weeks.

Q. Is it allowed at any time?

A. If there is improvement, it is allowed.

Q. Do you mean that according to modern surgery, that in order to prevent stiffening of the knee by lying in bed patient is allowed to move the joint and increase the injury done to the injured part?

Judge THOMPSON.—You need not answer that.

Q. You have testified, Doctor, that the natural

(Testimony of V. E. M. Osorio.)

result of the plaintiff if she had been allowed to remain in bed, if that leg had been kept immobile for several months, she would have been suffering?

A. Yes.

Q. And after being in bed for several months there [259—120] would have been, may have resulted in permanent stiffening? A. Yes.

Q. Would it have resulted in a permanent stiffening?

A. All depends how much addition there was to the joint.

Q. Addition by what?

A. By mobility of the joint.

Q. Will you tell us that?

A. Naturally, if you are not using your joint, additional motion within the joint, it causes the tissues to grow together and forms a mass there, would cause the joint to be immobile.

Q. That is your professional opinion, to having plaintiff lying in bed for several months would probably cause a permanent injury of that nature, would cause an injury known as permanent ankylosis? A. May cause permanent ankylosis.

Q. It may be slight and it may be great?

A. It may be.

Q. Is it not a fact under the circumstances which you describe that the joints should be manipulated by a doctor or surgeon from time to time to prevent such an injury?

A. When we have immobility, yes.

Q. Could it not have been done in this case, to

(Testimony of V. E. M. Osorio.)

have the patient lie up for several months, take the cast off every couple weeks or so, and have the doctor or nurse manipulate the joint, so that the muscle would not be playing on the injured joint?

Judge THOMPSON.—You need not answer that question.

Q. Would it not have been a proper procedure to have followed?

A. Not necessarily.

Q. What do you mean? [260—121]

A. We did not have a fracture here, of the joint, we are dealing with the tuberosity.

Q. Would it not have been a proper procedure to have the leg immobile so that the quadriceps tendon, or muscle, would not work, and to have had the patient placed at rest for several months, and at intervals during that interval of several months to have had the joint manipulated by a doctor or nurse to prevent ankylosis or atrophy?

A. I did not see any need of that in this case.

Q. It would have been a proper course?

A. Not in this case, not in a separation?

Q. Why?

A. Because I stated that if separation does not heal, there is nothing to do but to leave it alone and let nature take care of it.

Judge STANLEY.—I now move, if the Court please, to strike out all the evidence given by Dr. Osorio to the effect that the authorities named by him supported the proposition advanced by him, on the ground that the defendant has not been al-

(Testimony of Daniel V. Borden.)

lowed to cross-examine the witness on that statement, and to have the books and authority referred to by the Doctor, De Costa, to enable counsel to cross-examine him.

Judge THOMPSON.—The Court overrules the motion.

Judge STANLEY.—Note an exception.

**Testimony of Daniel V. Borden, for Plaintiff.**

Swearing of witness by the Clerk of the Court:

Direct Examination by Mr. RUSSELL.

Q. What is your name?

A. Daniel V. Borden.

Q. You are employed where?

A. First Bank of Hilo.

Q. In the bank as a clerk?

A. As a bookkeeper. [261—122]

Q. Were you employed in that institution last August? A. I was.

Q. Do you remember the time that Margaret fell down the elevator shaft? A. I do.

Q. You said you saw her fall?

A. I did not.

Q. And you were on the street at that time?

A. On the sidewalk.

Q. On which side of the street?

A. Facing this way on the right.

Q. That is on this side opposite that shaft in the store of Hoffschlaeger & Co.? A. Yes.

Q. You say you did not see her actually fall?



(Testimony of Daniel V. Borden.)

A. I did not.

Q. Was your attention directed to the accident as it occurred at that time?

A. Well, I looked across the street to see if I could recognize her as she was passing at the same time I saw Souza running toward the elevator and his action indicated that something had happened.

Q. That you saw Souza running up to this shaft?

A. I did.

Q. Just before that occurred did you see her on the sidewalk? A. I did.

Q. Did you speak to her? A. Not directly.

Q. What did you do?

A. I was going down the sidewalk about ten or twelve feet away from the steps of the tax office when I noticed the girl coming by the electric light office and Mr. H. N. [262—123] Low was on my right. The girl having very short dutch cut hair attracted my attention, and I remarked, "There comes duchy."

Q. Did you say it out loud?

A. Don't exactly know how loud I passed the remark, he and I looked toward the girl and the sidewalk, I caught the eye of the girl on us.

Q. From the time that you last saw her looking over at you two until the time that you saw Souza running, how long did the time last?

A. Must have been any way from 1/4 to 1/2 minute.

Q. I will count beginning with one and then you stop me when I get to the time, in your best

(Testimony of Daniel V. Borden.)

judgment that elapsed? 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15. A. There.

Q. About the time I count fifteen.

Judge STANLEY.—That would make twenty seconds.

Q. When you first saw her, she was looking at you, do you remember just at what particular point you were? A. I remember.

Q. At what point?

A. About ten to twelve feet away from the tax office steps from the library.

Q. You were coming toward Waianuenue Street?

A. Yes.

Q. And you say ten or twelve feet, on the other side of the steps of the tax office?

A. Yes. That is when I passed the remark.

Q. Then when you last looked away from her where were you? A. That is the time.

Q. You passed the remark and she looked at you instantly? [263—124]

A. She was looking that way I passed the remark, she grinned and cast her eye directly on us.

Q. How long were you looking at her?

A. Mr. Low said something by this time, we had approached the steps of the tax office, he started to go up, but after that remark I started in walking

Judge STANLEY.—I object to the evidence proceeding any further for the reason that it is incompetent, irrelevant and immaterial, and has no bearing on this case, and would not excuse any

(Testimony of Daniel V. Borden.)

want of care on the part of the plaintiff in this case.

Judge THOMPSON.—Motion overruled.

Judge STANLEY.—I note an exception.

(Continuation of previous answer by witness:)  
—and he started towards the tax office steps slowly before the remark was passed, I turned looked towards him, my head half turned, when he got up where the platform, the door is, he went inside the tax office and after walking a few feet sideways, and as I passed I noticed Margaret walking toward the elevator.

Q. This is a busy street is it not?      A. Yes.

Q. And it is built up on both sides with stores?

A. Yes.

Cross-examination of Witness by Judge STANLEY.

Mr. RUSSELL.—There is just one more question that I would like to ask the witness:

Q. As you were looking over on that side of the street did you at that time see the elevator open?

A. The second half was open.

Q. When did you first notice that? [264—125]

A. When I saw Souza running towards it.

Q. You had not noticed it before?

A. No, sir.

Judge THOMPSON.—You speak of one half being open, the half next to the wall or the street?

A. It runs the other way. The half towards Puueo. The Puueo side.

(Testimony of Daniel V. Borden.)

Cross-examination of Witness by Judge STANLEY.

Q. This grating which you are speaking about was in front of Hoffschlaeger's store on Keawe Street?     A. Yes, sir.

Q. And on what street, Mr. Borden, is the tax office?

A. On the same street. On Keawe Street.

Q. What is the name of the street that runs at right angles to Keawe Street, and being the street on which Cabrinha's store is situated?

A. Cabrinha's store is on Keawe Street.

Q. There is a street running at right angles to Keawe Street?

A. I believe it is Shipman Street.

Q. Waianuenue on one side and Shipman on the other?     A. Yes.

Q. On which side, Mr. Borden, of Shipman Street, is the tax office, towards Waianuenue Street?

A. Yes, sir.

Q. You call that on the Waiakea side?

A. Waiakea side.

Q. Is the other side Puueo?     A. Yes.

Q. So you say it is on the Waiakea side of Shipman Street, the tax office?     A. Yes. [265—126]

Q. The electric light store which you are speaking about, whereabouts is that?

A. That is on Keawe Street, on the corner of Keawe and Waianuenue Street.

Q. Is this tax office you are speaking of on the corner of Shipman and Keawe Street?

(Testimony of Daniel V. Borden.)

A. Yes.

Q. You say you made a remark to a Mr. Low, when you saw Margaret? A. Yes.

Q. When you made that remark on which side of the steps of the tax office were you?

A. On the Puueo side.

Q. That would be the side nearest to Shipman Street? A. Yes, sir.

Q. State whether or not you recognized Margaret at that time? A. I did not.

Q. In making this remark did you make it with the intention that this girl whom you did not recognize, and who was a stranger so far as you knew at the time, should hear you?

A. I did not intend for her to hear me.

Q. It was a remark made to Mr. Low, and not to be carried by your voice across the street, so that this stranger should hear it? A. No.

Q. State whether or not, Mr. Borden, it was made in an ordinary conversational tone to Mr. Low?

A. It was.

Q. When you made this remark, you say you and Mr. Low grinned? A. Yes, sir. [266—127]

Q. There is a difference between grinning and laughing out loud. A. It was not loud.

Q. You did not laugh out loud to attract the attention of this stranger? A. No, sir.

Q. And at the time you made the remark, did I understand you to say, that you caught the eye of the girl, who turned out afterwards to be Margaret,



(Testimony of Daniel V. Borden.)

so she was looking toward you and your friend, Mr. Low?     A. Yes, sir.

Q. Then I will ask you, can you give us any approximation of the distance there was between you and the girl when you made the remark the way you say?

A. Anywheres from seventy-five to one hundred feet.

Q. And you did keep your eyes on the girl after you saw that she had looked towards you?

A. I did not.

Q. There was no acknowledging of her or any of that kind?     A. No.

Q. I believe you say that having made the remark and grinned over it, and having got the eye of the girl, you turned around to Mr. Low, continuing the conversation with him?     A. Yes.

Q. And took no more notice of the girl?

A. No.

Q. How far, Mr. Borden, had you to walk from the place where you had passed this remark until you reached the steps of the tax office?

A. About ten feet. [267—128]

Q. And during that time were you watching the girl?     A. I was not.

Q. State whether or not when you reached the steps of the tax office you walked right on or stopped talking to Mr. Low?

A. I did not stop walking; I was walking slowly up as he was going up the steps and speaking.

(Testimony of Daniel V. Borden.)

Q. Then you came along Keawe Street from the steps of this tax office until you got opposite the grating of Hoffschlaeger Company's premises?

A. Not exactly opposite, but went on so opposite me I did not see the girl.

Q. That when you had gone far enough when you thought you would be opposite her, you did not see her?     A. Yes.

Q. About how far had you gone from the time that you left the steps of the tax office until you reached the place where you looked for the girl and met her?     A. About fifteen feet.

Q. Between the time that you had made this remark "Here comes duchy" to Mr. Low, and got her eye on you and turned back to talk to Mr. Low you did not see the girl until after the fall?

A. No, sir.

Q. After you had caught her eye you did not know where she was looking or what she was looking at?     A. No, sir.

Q. You say, Mr. Borden, that prior to the time that the girl fell you had not observed the position of the grating?     A. No, sir.

Q. Did you observe it immediately after you saw Souza running excitedly toward it?     A. I did.  
[268—129]

Q. Was the reason that you had not seen the position of the grating until after the girl fell, the fact you were not interested in it?     A. I was not.

Q. And you were not looking to see what was on the sidewalk?     A. I was not.

(Testimony of Daniel V. Borden.)

Q. You were walking slowly along Keawe Street attending to your business, until you reached the point where you saw the girl?

Judge THOMPSON.—Judge Stanley, the evidence you are eliciting from the witness does not help the case a particle in the world.

Judge STANLEY.—I respectfully note an exception to your Honor's statement in the presence of the jury that the evidence that I am now eliciting does not help the case a particle in the world.

Q. I will show you, Mr. Borden, Plaintiff's Exhibit "H," and ask you whether or not that is a picture of the grating and shows the condition in which it was as to its being half open and half shut at the time of the accident?

A. It is the exact position of the grating at the time of the accident.

Mr. RUSSELL.—We would like to recall the plaintiff, in order to make one or two corrections.

**Testimony of Margaret Fraga, in Her Own Behalf  
(Recalled).**

MARGARET FRAGA, take the stand.

Q. On your direct examination you testified that before the accident you had not been absent at all from school and that when certain dates were pointed out to you by counsel for the defendant, you stated that you had not been absent from school, do you want to make a correction?

A. Yes. [269—130]

(Testimony of Margaret Fraga.)

Q. Will you state what corrections you wish to make?

A. I do not quite remember the date; once I was sick my tonsils were swollen and the other time I had them cut?

Q. Who cut them?

A. Dr. Sexton. Then I went to Honolulu for a week, that was in June. I was not sick, I just went.

Q. What was the occasion, something about the Foresters; there was some carnival there?

A. Yes.

Recross-examination of Witness by Judge  
STANLEY.

Q. Do you remember when it was you had your tonsils cut? A. No, I don't.

Q. Do you remember when it was that your tonsils were swollen?

A. I don't know the date. I remember that I had trouble; cannot remember the time.

Q. And how long away from school when you had your tonsils cut? A. Three days.

Q. And how long when they were swollen?

A. I don't quite remember.

Q. Was this time that you were absent in June at the end of the term? A. It was during school.

Q. Did you leave school just before the end of the term and not come back?

A. Two weeks before the end of the term.

Q. And stayed away for a whole week, and

(Testimony of Margaret Fraga.)

came back and finished the term? A. Yes.  
[270—131]

Judge STANLEY.—If your Honor please, I would like to ask the witness another question, although it is not cross-examination?

Judge THOMPSON.—Very well.

Q. Is it not a fact, Margaret, that during the next school year that you were away from school for one stretch of ten days in the month of January?

A. Yes.

Mr. RUSSELL.—January of this year?

Judge STANLEY.—January of this year.

Q. Not school days that you were absent, but from about the 15th of January to the 24th of January? A. I don't remember.

Q. You don't mean ten school days, but 10 days, including Sundays and other days? A. Yes, sir.

Redirect Examination of Witness by Mr.

RUSSELL.

Q. What was the occasion of your being absent?

A. I was sick.

Mr. RUSSELL.—If the Court please, we would like to offer in evidence now the record of the appointment of Alfred Fraga, as guardian *ad litem*; in order to avoid any question may it go in the records.

Judge THOMPSON.—It may be admitted Plaintiff Exhibit "O."

Mr. RUSSELL.—If the Court please, that is all of our case, except that we wish at this time to ask



that the jury view the premises in question, as part of our case and that in doing so, with your Honor's approval, there should be some one delegated to point out the grating and I am willing to have Judge Stanley delegated. [271—132.]

Judge THOMPSON.—I think after the testimony is all in. I will reserve my ruling. The chief reason is this, that questions might arise in the presentation of the defendant's case to have to go back again. The safest thing to do is to wait until all the evidence is in and view the premises at that time.

Mr. RUSSELL.—That sounds very plausible.

Mr. RUSSELL.—The plaintiff rests.

Judge STANLEY.—I now move, if the Court please, that the plaintiff be nonsuited on the ground that the evidence shows that the plaintiff was guilty of contributory negligence, which would bar any recovery in this action and I would like to have an opportunity to argue this matter.

Judge THOMPSON.—How long are you going to argue?

Judge STANLEY.—Depends on how long your Honor will allow me.

Judge THOMPSON.—Well, I don't object to hearing good argument at any time.

Judge STANLEY.—And I will ask that the jury be excused.

Jury excused.

Judge THOMPSON.—You know very well what the rule is, that I can't sustain your motion.

(Testimony of Fujii Yamagi.)

Judge STANLEY.—I take it your Honor could sustain the motion, the evidence is plain that plaintiff was walking along that street that—

Judge THOMPSON.—I remember all of that.

Judge THOMPSON.—I don't see how the Court could possibly do otherwise, than overrule the motion. [272—133]

Judge STANLEY.—I will take your Honor's ruling.

Jury recalled.

Judge THOMPSON.—The motion is overruled.

Judge STANLEY.—I note an exception.

**Testimony of Fujii Yamagi, for Defendant.**

Swearing in of witness by Clerk of the Court:

Direct Examination by Judge STANLEY:

Q. What is your name? A. Fujii Yamagi.

Q. What is your business, Fujii?

A. Warehouseman and deliveryman.

Q. Where? A. Hoffschlaeger.

Q. Hoffschlaeger, Limited, store in Hilo?

A. Yes.

Q. Fujii, do you remember the accident which happened to this girl, Margaret Fraga, in August of last year? A. Yes.

Q. That was when she fell down the elevator in front of Hoffschlaeger's store? A. Yes.

Q. Now, had you been working in that elevator or done anything to the elevator just before the accident happened?

A. I was in the store.

(Testimony of Fujii Yamagi.)

Q. Now, do you know who opened the elevator gate? A. I opened it.

Q. How many doors are on that elevator?

A. There is two.

Q. How many of those doors did you open?

A. Half, one side.

Q. And that was on the side nearest Shipman Street? A. Yes. [273—134]

Q. For what purpose Fujii had you opened that gate?

A. I opened so that I could go down in the cellar to take some goods out.

Q. And put them where?

A. On the sidewalk.

Q. To be left there; somebody was to call for them? A. Somebody was to call for them.

Q. Why did you only open one gate?

A. Well, it was wide enough to let the goods out.

Q. With one gate open, there would be sufficient room to allow you to put up the goods which you wanted to get on the sidewalk? A. Yes.

Q. It was not necessary to open both gates?

A. No.

That is all.

Cross-examination of Witness by Mr. RUSSELL.

Q. How long had you been working there at that time? A. Two years and five months.

Q. The reason why you only opened one side was because that was wide enough to permit the passage of the goods? A. Yes.

(Testimony of Fujii Yamagi.)

Q. That was the only reason that you had?

A. Yes.

Q. The wagon had not arrived there to take those goods?

A. Not our wagon; it was country wagon.

Q. But that wagon had not arrived? A. No.

Q. You did not know how long it would be?

A. No.

Q. When you went down there, you went down for the [274—135] purpose of putting those goods on the elevator? A. Yes.

Q. And you were not to take those goods up until the wagon had arrived?

A. Were going to take right up.

Q. It would have taken you some little time to get them from the cellar? A. Yes.

Q. How long were you down there before the girl fell? A. Two minutes.

Q. Two full minutes? A. Yes.

Q. You know how long that is, a minute?

A. Sixty seconds.

Q. You could count one hundred twenty seconds fairly slow before the girl fell down? A. Yes.

Q. You have been working there two and a half years? A. Yes.

Q. You knew that was a busy street? A. Yes.

Q. You know that people pass back and forth?

A. Yes.

Q. You know that school children pass?

A. Yes.

(Testimony of Fujii Yamagi.)

Q. You know that was the hour for them to pass? A. Yes.

Q. You never thought about school children at that time? A. No.

Q. Don't you usually when you go down in the basement shut the gate after you, don't you do that?

Judge STANLEY.—Object if the Court please, incompetent, [275—136] irrelevant.

Mr. RUSSELL.—I will withdraw the question.

Q. You helped take the girl up and took her to Cabrinha's? A. Yes.

Q. You told Mrs. Cabrinha—

Judge STANLEY.—Object. Not proper cross-examination. The witness is called for the purpose of showing who opened the gate and why it was opened.

Mr. RUSSELL.—Question withdrawn.

That is all.

Judge STANLEY.—Mr. Borden take the stand.

### **Testimony of Mr. Borden, for Defendant.**

Q. Mr. Borden, state whether or not at any time or times following the accident to the plaintiff, Margaret Fraga, you have seen her walking on the streets of Hilo? A. I have.

Q. Have you seen her only once or a number of times?

Mr. RUSSELL.—That is objected to, as incompetent, and irrelevant, no foundation having been



(Testimony of Mr. Borden.)

laid for this question; it is evidently intended to introduce for the purpose of discrediting the testimony of the plaintiff, and to do so, it is incumbent upon the defendant to first point out the particular time and place the plaintiff was seen to walk.

Judge THOMPSON.—The Court overrules the motion.

Q. Have you seen the plaintiff walking on the streets of Hilo once or a number of times since the accident?   A. A number of times.

Q. Did you remain in Hilo from the time of the accident up to the present time?

A. I did not.

Q. How soon after the accident did you leave Hilo?

A. I left Hilo on September 13th. [276—137]

Q. And returned when?   A. September 30th.

Q. State whether or not you saw her walking on the streets of Hilo before the 13th of September?

A. I did not.

Q. State how soon after your return to Hilo on the 30th of September did you first see her?

A. Between two or three weeks.

Q. That would be in the middle of October?

A. Yes.

Q. Where was she walking at that time?

A. She was walking on Keawe Street, towards Cabrinha's store.

Q. From the direction of Waianuenue?

A. Yes.

Q. You have seen her a number of times?

(Testimony of Mr. Borden.)

A. Yes.

Q. Have you seen her on any other occasion walking on the same street in the same direction?

A. May have seen her twice a month or so, I always see her on Keawe Street, going towards Cabrinha's store.

Q. How long has that continued?

A. I have seen her about twice a month.

Q. You mean up to the end of the year?

A. Up to the present time; or within two months from now, I have not seen her lately on the street.

Q. It would be then up to the month of March; you saw her from the middle of October towards the end of March, about twice a month?

A. About twice a month.

Q. State whether or not you have seen her on any other street?     A. I have not. [277—138]

Cross-examination of Witness by Mr. RUSSELL.

Q. The occasions that you saw her were always after school, were they not?     A. It was.

Q. And you know, do you not, that she walked down slowly to Cabrinha's and there take a machine to go home?     A. I have seen her in a machine.

Q. That is the same day, later on you have seen her in a machine?     A. Yes, I did.

Q. And you noticed that she walked slowly?

A. I did.

(Testimony of Mr. Borden.)

Redirect Examination of Witness by Judge  
STANLEY.

Q. And whereabouts is the Union Grammar school which she attends?

A. Well, it is up here about three blocks.

Q. On what street is the school?

A. On Kapaiolani Street, used to be School Street.

Judge THOMPSON.—You mean two blocks from Cabrinha's?

A. Three blocks from the front of this building.

Q. And Keawe Street is how many blocks down?

A. One block.

Q. That would be four blocks down Waianuenue Street and one block across?

A. It would be four blocks in all from the school to Cabrinha's store, downhill.

That is all. [278—139]

**Testimony of L. L. Sexton, for Defendant.**

Swearing of witness by Clerk of the Court:

Q. What is your name?     A. L. L. Sexton.

Direct Examination by Judge W. L. STANLEY.

Q. Doctor, you are a physician and surgeon practicing in the City of Hilo, are you not?     A. Yes.

Q. And how *how* have you been so practicing?

A. Since 1910.

Q. And you are duly and regularly licensed to practice under the Territorial Laws?     A. I am.

(Testimony of L. L. Sexton.)

Q. State, Doctor, where you received your medical education?     A. University of California.

Q. When did you enter the University?

A. In 1902.

Q. And you graduated from the University of California?     A. I did.

Q. With a degree in medicine and surgery?

A. I did.

Q. In what year?     A. In 1907.

Q. Making it a course of five years?

A. Yes, I was out one year.

Q. State, Doctor, what if any experience you had in practice prior to coming to Honolulu?

A. I spent a year in the Southern Pacific Hospital, Sacramento, California; I spent 18 months in the Queen's Hospital in Honolulu, and 11 months at Hakalau; the remainder of the time in Hilo. [279—140]

Q. Doctor, state what, if any, experience you have had with the taking and interpreting of what is practically called X-ray plates?

A. I have had quite a good deal of experience and taken interest in that since graduation; worked in it more or less ever since.

Q. State whether or not you own an X-ray machine?     A. I do.

Q. And have owned one for about how long?

A. Five years.

Q. And prior to that and since your graduation you have taken an interest in the subject?

A. Yes. I have.

(Testimony of L. L. Sexton.)

Q. And have continued it in your practice?

A. Yes.

Q. I hand you a plate, being exhibit "B" in this case, exhibited as photographic X-ray plate taken on the 4th day of September of last year, and ask you to state whether or not you have examined that before? A. Yes, I have.

Q. What picture is shown on that plate, Doctor?

A. Picture of a knee.

Q. Can you tell whether it is the left or right knee, or do they look so much alike in a plate?

A. This film is a duplex film, motion on both sides, and I do not know which side the impression is on. Oh, yes; I do. That is the left knee.

Q. State, Doctor, when you first examined that at my request? A. Monday of this week.

Q. And, Doctor, will you please state, what, if any, pathological condition you find represented on that plate; calling your attention particularly to the upper epiphysis [280—141] of the tibia?

A. I find no pathological condition represented.

Q. What do you mean, Doctor?

A. I find no diseased condition, either as the result of disease, or injury; in other words, there is nothing represented here except the normal condition of the bone, that you would find in a healthy normal individual.

Q. Do you mean, Doctor, that the plate shows no injury to the leg? A. Yes.

Q. I will ask you, Doctor, calling your attention to the— (Question withdrawn.)



(Testimony of L. L. Sexton.)

Q. What, Doctor, is the tubercle of the *tibier*?

A. The downward like projection that extends down on the front of the tibia; downlike projection of the upper epiphysis.

Q. And how is that separated, Doctor, from the shaft of the tibia?

A. Separated by an intervening cartilage.

Q. And what is the name of that cartilage?

A. Epiphyseal cartilage.

Q. Calling your attention, Doctor, to that particular portion of the leg shown on the plate, state whether or not the picture shows any abnormal condition of the tubercle of the tibia. From the shaft?

A. It does not.

Q. I hand you, Doctor, Plaintiff's Exhibit "C" and ask you whether you recognize that as a print of the plate you just examined?

A. I believe that it is. [281—142]

Q. From what are you able to receive the more detail,—the plate or a print of the plate?

A. From the original plate.

Q. Now, Doctor, calling your attention to the print, state whether or not this print shows the epiphyseal line, or line of the epiphyseal cartilage?

A. It does.

Q. State whether or not that epiphyseal line is marked on the print by any letters or lines representing the dotted lines inked in?

A. The epiphyseal line is fairly accurately followed by the ink line which—

Q. Which ink line do you mean, Doctor?

(Testimony of L. L. Sexton.)

A. A to C.

Q. State, Doctor, whether that print shows any abnormal separation of the epiphyseal cartilage between the end of the tubercle and the shaft?

A. No, it does not show any.

Q. I will show you, Doctor, when I get it, two other pictures being exhibits "D" and "E," of what purports to be the same leg and ask you whether or not you have examined those plates before at my request?     A. Yes, I have.

Q. There are two pictures on that plate?

A. Yes.

Q. There are two plates, one exhibit?     A. Yes.

Q. Do they both represent a picture of the leg from the same angle?     A. No. [282—143]

Q. What does exhibit "D" present? One, Doctor, represents a side view, a picture taken at the side of the leg and the other represents a picture of the anterior and posterior view, does it not?

A. This one on this side is the lateral view, this one is the anterior-posterior view.

Q. State whether or not, Doctor, the print of the lateral side shows any pathological condition of the knee.     A. It does not.

Q. That is the picture taken from the lateral?

A. Yes.

Q. That is the picture taken from the lateral, you find no signs?     A. No.

Q. Either from accident or disease?     A. No.

Q. You find any signs, Doctor, in that print of

(Testimony of L. L. Sexton.)

any widening of the epiphyseal cartilage between the tubercle and the tibia?

A. None, except the normal.

Q. Are you able to tell anything as to the condition of the leg represented there from the anterior and posterior view?

A. In reference to the epiphysis, tubercle; no, don't show any.

Q. Does the plate show any injury to any portion of the leg? A. No.

Q. And how about exhibit "B," does that show any injury to the knee? A. No. [283—144]

Q. I ask you because I called your attention to the epiphyseal cartilage and the tibia?

Q. I will ask you, Doctor, to state whether or not these pictures, plates, which you have been examining will were taken by you, made by you?

A. Made in my office.

Q. You were in Hilo when they were made?

A. No.

Q. That is the ones made on September 4th and March 4th. A. No.

Q. Where were you then, Doctor?

A. I was absent from Hilo. I think I was in New York.

Q. Are you associated with any other medical man? A. Yes, with Dr. Heck.

Q. And was he present at that time in Hilo?

A. He was.

Q. Where is he now? A. On the coast.

Q. And has been for how long?

(Testimony of L. L. Sexton.)

A. About ten days; he left about ten days ago.

Q. I will ask you, if at my request, or the request of myself and counsel for plaintiff in this case you had any pictures taken of the girl's, Margaret Fraga's, leg this week? A. I did.

Q. On what day?

A. I don't remember; either yesterday or day before.

Mr. RUSSELL.—It is admitted that it was Tuesday the 24th inst. [284—145]

Q. How many plates were taken at that time, Doctor? A. Four.

Q. What views?

A. Two lateral views of the left leg and two lateral views of the right leg.

Q. I hand you Plaintiff's Exhibit "K" filed in this suit, consisting of two plates numbered 1014 and 1015, and ask you if those plates were made in your office? A. They were.

Q. And what do those plates show, Doctor—what portion of the body?

A. Shows the two lateral views of the left knee.

Q. Of the plaintiff in this case? A. Yes.

Q. Have you examined the plates before?

A. I have.

Q. State whether or not you can find any indications of injury, either by accident or from disease, shown on those plates. A. There is none.

Q. Calling your attention, Doctor, particularly, to the tubercle of the left leg, the tibier and the epiphyseal cartilage separating those two, state whether

(Testimony of L. L. Sexton.)

or not anything abnormal are in either of those pictures?     A. Nothing abnormal.

Q. Can the fact that there is nothing abnormal in a particular leg generally be definitely determined by the examination of a picture of that leg only?

A. Not unless the injury is—unless the departure from the normal is marked. In the case of a break around the bone, you would know that it is abnormal; but the condition varies, and at different ages it would be impossible to determine within any narrow limit at all, how much, if any, [285—146] departure in any given case from the normal without comparison with the known normal condition and preferably of the same individual.

Q. Does this width of the epiphyseal cartilage between the tubercle and the tibial vary in different individuals of the same age and sex?

A. It does.

Q. So far as you know, any, is there any standard width of that epiphyseal cartilage?

A. The only standard is the comparison of the part affected in the same individual. There are some variations in the same age and sex that there can be no standard made.

Q. You state, Doctor, at the same time plates exhibited to you were made, you also had taken pictures of the right leg of the plaintiff?     A. Yes.

Q. I hand you Plaintiff's Exhibit "N" and ask you to identify that as the two plates of the right leg?     A. Yes.



(Testimony of L. L. Sexton.)

Q. Now, Doctor, in forming your opinion on the question as to whether there was anything abnormal in the condition of the epiphyseal cartilage between the tubercle and the shaft of the left leg of the plaintiff, as shown by those pictures, have you passed your opinion on any one picture alone, or on a review and examination of all the plates together?

A. Taking all the plates together, collectively, I have passed my opinion.

Q. What comparison of the plates of the left leg taken last Tuesday with the plates of the right leg taken on the same day, indicate to you?

A. They both indicate a normal condition of each part. That is the lateral views of the right knee indicate [286—147] a normal condition of the part shown in that the two lateral views of the right indicate a normal condition in that picture.

Q. Can you, Doctor, show to the jury on these plates the part which you were speaking of and indicate the part which you say are similar?

(Witness indicates to jury the parts.)

Q. You say that a comparison shows you that the condition on both legs were normal? A. Yes.

Q. Will you point out to the jury the parts to which you have been referring?

(Witness indicates to the jury the parts.)

A. This is the tibial or large bone and this is the kneecap here. On here this little point, the same thing here is what we are talking about, the tubercle. That the muscle attaches to in moving

(Testimony of L. L. Sexton.)

the leg. This line, what we call the epiphyseal line, begins here, and under it and comes down here and goes down to this point here in every person until the age of 20 to 25; the same thing is shown here, but with a great deal of variation; for instance this is the same leg; this is the right leg here, and the right leg here, 1017 and 1016, plates. One picture was taken from this side of the leg. One taken from the internal aspect and one from the external aspect.

Q. By the internal aspect, what do you mean?

A. Inside of the leg. And the other from the outside of the leg.

Q. Here, Doctor, on exhibit "C" both in the epiphysis, correct me if I am wrong, and below the line "A-C" on the shaft of the tibia are some wavy white lines. State whether or not those white lines indicates anything in the nature of fractures or that kind? [287—148]

A. Those are scratches made by the operator accidentally in making the picture while the plate was wet. With his nail.

Q. It has nothing to do with the bone?

A. No.

Q. You have, Doctor, testified that as the result of your examination of all these plates there is nothing abnormal shown in the plates of the plaintiff's left knee? A. Yes.

Q. Or in the tubercle of the left knee, or in the epiphyseal cartilage between the knee, between the knee and the epiphyseal? A. Yes.

(Testimony of L. L. Sexton.)

Q. I will ask you if you—is there any separation of the epiphysis of the tubercle? If there is any such separation, or indications that there ever was?

A. No.

Q. Now, Doctor, assuming that there was a separation of that epiphysis between the point indicated between the tubercle and the tibia, state whether or not, state whether there is in medical or surgery science a recognized method of treatment to be followed in the curing of that condition?

A. Yes.

Q. Will you state what this is?

Objection by Mr. RUSSELL.—Objected to as immaterial and irrelevant. If the Court please, if they are trying or attempting to show that the method of treatment of Dr. Osorio was unskillful or negligent, that would not bind the plaintiff, unless they can show that Dr. Osorio's reputation as a physician is unskillful. All the law requires upon an injured person is to select a duly qualified physician.

(Objection overruled.)

Mr. RUSSELL.—Exception noted. [288—149]

Q. Assuming that there is a separation of the tibia from the tubercle, the recognized treatment is what we want?

A. The recognized treatment of a separation of the tibia from the tubercle, is first of all, rest in bed with the knee held out in a straight position, and kept in a straight position for a definite length of time, and the other attendant treatments, attention

(Testimony of L. L. Sexton.)

to the bowels, and do all the other things that would go along with other conditions would have to be recognized, but the essential part of this treatment of this condition is to render the leg immobile or keep it from moving by some apparatus or another, or a piece of wood put on the back of the leg or on the side of the leg, long enough to keep the individual from moving the knee-joint. A recognized splint is a long strip of wood from the ankle to the hip or on the side, or a plaster of paris cast, or a hammock or pulley that keep the knee absolutely quiet from movement, and must be kept up continually.

Q. And with that treatment, Doctor, what would be the probable duration of disability of the patient?

A. You mean disability up to time in bed or when he is ready to begin his occupation.

Q. The time in bed only?

A. Three or four weeks.

Q. And how long would it be after that assuming that the patient were receiving the treatment you have described, would it be before the patient had fully recovered. From the time of injury to full recovery?

A. Four weeks in bed and a couple of weeks walking very carefully, six weeks, a month or six weeks after that should see complete recovery.  
[289—150]

Q. Now, Doctor, what is the object of keeping the leg immobile in that treatment?

A. It goes back as a matter of mechanics. The

(Testimony of L. L. Sexton.)

thing that produces motion of this leg, either leg, the muscle that moves this leg or any leg in that direction, the chief muscle is this big muscle here, and it must be kept quiet; this muscle comes down across the kneecap and attaches to the tibia tubercle, and it must be kept in a quiet state so that the injury can heal.

Q. And what is that big muscle called?

A. Quadriceps femoris and begins in the ligamentum patellae which is a fine strong band of fibrous tissue and connects to this tubercle and pulls on that and pulls the leg up and acts as a pulley, and this injury here being between this tubercle and the bone, so that pulling that on that tuber would pull it away from the bone and would make the condition worse. You already have a separation at pulling apart of that tuber from the bone and if you continue you continue to separate still further, the idea is to keep that leg in that position and when it is in that position there is no pull on that part which you want to keep at rest.

Q. You say, Doctor, that this leg should be kept immobile for a period of four weeks.      A. Yes.

Q. So that there can be no action by the quadriceps muscles on the injured tubercle?      A. Yes.

Q. At the end of the four weeks, Doctor, what becomes of the splints or cast or other mechanical contrivance?

A. I think I would modify my previous statement that [290—151] I made including a cast, I don't think that it would be proper, for the sim-



(Testimony of L. L. Sexton.)

ple reason that the cast is too cumbersome to take proper care of the knee; I believe it is being discarded very largely, as the doctors themselves or other attendants cannot exercise the knee-joint during that time.

Q. Not using the cast very much, now do I understand in the treatment, where the leg is placed in a splint or other mechanical contrivance, is included a course of manipulation of the injured part by the doctor or nurse? A. Yes.

Q. What is the object of this?

A. The object is to prevent any stiffening of the knee-joint. It has to be done by some one other than yourself to appreciate it.

Q. Explain to the jury what difference, if any, there is between having that knee-joint manipulated by a third party, or whether the patient manipulates it himself by the ordinary use of flexing and extending it?

A. All the difference as between running an automobile on its own gasoline, and pushing it with your own gasoline. The only way that a patient can move that himself is by the use of that muscle which pulls on this muscle; you don't want to pull on it as it increases the injury to the diseased part. When some one else does that there is no tightening of the muscle.

Q. That is the outside manipulation takes the place of the muscles? A. Yes.

Q. Now, in describing this treatment you are

(Testimony of L. L. Sexton.)

necessarily including manipulation in order to prevent a stiffening of the knee-joint?

A. Yes. [291—152]

Q. That is generally called ankylosis?

A. When it is complete it is called ankylosis.

Q. Now, Doctor, I will ask you to state whether or not this treatment that I will describe to you of an injury of that nature would be considered proper by recognized medical authorities, namely, the bandaging of the injured leg above the knee and below the knee with a tight adhesive plaster. Putting the patient to bed for a period of three weeks, preventing so far as can be done, mobility of the leg while the patient is confined to bed, by means of pillows lying on either side, and allowing or permitting the patient during the last of such three weeks to leave the bed and move around the house for the purposes of nature or for other purposes, including going from one room to another for drinking water.

Mr. RUSSELL.—Objected to on the ground that the plaintiff cannot be bound by any particular method of treatment unless it is shown that there was not proper judgment exercised in the selection of surgeon.

Judge THOMPSON.—Motion overruled.

Mr. RUSSELL.—Note an exception.

Judge THOMPSON.—The Court understands, Judge Stanley, that that is a hypothetical question.

Judge THOMPSON.—(To Witness.) You may answer the question.

(Testimony of L. L. Sexton.)

A. That treatment is partly right. I would say that it is a good deal wrong because of the fact that the leg was not kept absolutely away from the action of the muscle during the entire time. I believe that this is the most important part of the whole treatment for the reason that just the moment you allow that muscle to act, even for one step, you are almost sure to tear down all of the healing process that has been going on for twenty-four hours. [292—153] Therefore taking one step forward retards the healing process, and I believe every authority that I have ever read will lay more stress on this, that is, the all-important point to the treatment next to the personal supervision of the exercise of that joint.

Mr. RUSSELL.—I now move that the answer of the witness be stricken upon the ground that it cannot relieve defendant and also upon the ground that assuming that the treatment referred to, and included in the so-called hypothetical question was unsuccessful or negligent, that that would not relieve the defendant of any liability whatsoever, and upon the ground that all a plaintiff is required to exercise is reasonable fair judgment in the selection of the physician or surgeon.

Judge THOMPSON.—Motion overruled.

Mr. RUSSELL.—Note an exception.

Q. When you speak, Doctor, of the treatment and the recognized treatment including a confinement to bed for a period of three or four weeks, do you

(Testimony of L. L. Sexton.)

mean that there is any standard setting four weeks as the extreme limit?

A. No, I don't believe there is any. There is no definite standard. I will say four to five weeks with the treatment as I have previously outlined, carried out rigidly, that in four to five weeks, ninety per cent of the cases should be well; well enough to get up on their bed and use care in moving carefully and in not undergoing any extreme forcible exercise for a couple of weeks more, I think that four or five weeks in bed with the proper after treatment should see a complete recovery in ninety per cent of the cases. [293—154]

Q. Is there any medical authority, Doctor, that you know of or ever read of for the proposition that if you have not a healing within three or four weeks then it is useless to keep the patient in bed; that nothing can be done for the injury by rest and that nature must be allowed to take its course?

A. I don't recall any authority that would let me— I don't recall any authority for that supposition at all. May I repeat the question. Do I know of any authority that says that after a period of three or four weeks, if healing is not complete nature will have to take its course, and nothing can be done and that nature will have to take its course. I don't know of any such authority.

Q. You said you don't know of any such authority? What is your professional opinion on that?

A. I would say that that was definitely wrong.

Q. Do you know of any authority, medical au-

(Testimony of L. L. Sexton.)

thority for this proposition that if an injury which may be called a separation of the tubercle of the epiphysis, is not healed within three or four weeks, or four of five weeks, the person injured being of the age of thirteen years or thereabouts, that there will be no healing until the epiphyseal cartilage is changed into bone, when the patient reaches adult life and between the ages of twenty and twenty-five?

A. I don't know of any authority for that statement.

Q. You are familiar with a number of works, that are standard authority. A. I am.

Q. Have you ever come across in your reading either of those propositions? A. No. [294—155]

Q. And what is your own professional opinion, Doctor, on the last proposition,—that if no complete healing takes place three or four weeks, that there will be no healing of the epiphyseal until the age of twenty to twenty-five.

A. I don't see any reason for the statement. I don't know why any reason at all; any reason why the process of repair and healing should go on a strike for a matter of twelve years; I don't know of any reason for the statement.

Q. Then your opinion is there is no reason for the statement?

A. It is borne out in everyday practice.

Q. And you say it is not recognized by surgical authorities? A. It is not.

Q. Now, Doctor, assuming that after the expiration of a stay in bed of three weeks, the treatment



(Testimony of L. L. Sexton.)

being as I before described to you, adhesive band below and above the knee, and the patient's leg being kept immobile by means of pillows on either side of the leg, that the patient is allowed to attend school, patient being a girl of the age of thirteen, daily, to walk about a school, and walk about, around her home premises, at various times, when not at school, and with merely an adhesive bandage strapped around the leg, what is your opinion,—what do you say as to that treatment as being recognized and proper or not.

Mr. RUSSELL.—Same objection as the previous question.

Judge THOMPSON.—Objection overruled.

Mr. RUSSELL.—Note an exception. [295—156]

Q. That before the separation has healed, the patient is allowed to attend school and walk about at school, and is allowed to walk around the house, what do you say, Doctor, as to whether this is a recognized treatment?

Mr. RUSSELL.—Note an objection.

Judge THOMPSON.—Objection overruled.

Mr. RUSSELL.—Exception noted.

A. The same objection is raised to that form of treatment as referred to in the other namely, that before this tubercle is fastened again by healing process, if you allowed the patient to walk around and use the leg and pull that leg, it would not heal, it is not recognized as right, but is recognized as wrong.

Q. State whether or not, Doctor, the bandage

(Testimony of L. L. Sexton.)

around the knee would prevent the play of the muscle upon the injured part?

A. It would not. The bandage that you spoke of. No.

Q. Would it make any difference, Doctor, whether the patient was to extend and flex the leg in walking, or walk with a stiff leg. Would that make any difference in the amount of pull in the tubercle, the amount of pull exercised on that tubercle by walking stiff-legged would be more than the pull on that tubercle would be more than walking on that leg.

A. It would be separated.

Q. Why?

A. For the reason you have to have the tendon contracted to keep the leg stiff. The act of walking is almost involuntary and automatic; part of the weight falls forward as the body is inclined and the muscles are used, whereas walking stiff-legged you have to keep the muscles tight. You have more strain walking stiff-legged.

Q. And walking in either way would have a constant [296—157] tendency to increase the injury and retard the recovery?

Judge THOMPSON.—Need not answer the question. Both parts of the question have been answered in the opinion of the Court.

Q. Assuming that after a stay in bed of three or four weeks under the treatment I have described to you, with adhesive bandage around the knee, and assuming that after the expiration of that three or four weeks, the patient is permitted to do the walk-

(Testimony of L. L. Sexton.)

ing that I have described, what in your opinion, Doctor, would be the probable duration of the disability?

A. Well, it would be very hard to determine. As long as you continued the irritation by walking, I don't see how you could get any union of the two parts; I presume that if it were continued long that inflammatory process would set up there so that you ultimately would have a fibrous union.

Q. You mean a deformity would occur?

A. Very likely to. If you keep pulling that tubercle I presume eventually you would have quite a dent.

Q. Then would it be right to say, Doctor, that the period of recovery from that injury would be delayed as long as the patient was allowed to continue walking?

A. Why, no. I don't know there is any authority on that point. Nature might get ahead of that if kept up long enough. The longer you keep up the walking and irritation the longer it would not heal. [297—158]

Q. It has been suggested here that any injurious effects upon the injured part there might be owing to the action of the muscle on the injured part in the act of walking might be offset to some extent by the counter-irritation that would be set up in the act of walking. Do you know of any authority, any reason behind such a proposition?

Mr. RUSSELL.—I take it that counsel has that wrong. Doctor Osorio said that counter-irritation

(Testimony of L. L. Sexton.)

would be necessary and admissible in the present case.

Judge THOMPSON.—That should not be discussed in the presence of the jury.

Mr. RUSSELL.—I object to the question.

Judge THOMPSON.—I will state that you are doing the thinking in this question; ask your question. The Court don't know your question.

Judge STANLEY.—But if the Court please I have put the question in the language that was used by the witness, not this witness.

Q. Is there any authority for the proposition that any injury that would be done through allowing the quadriceps tendon or muscle to act upon the injured part during the process of walking, would be offset by the fact that the counter-irritation would induce boney tissue?

Mr. RUSSELL.—That is objected to as being immaterial, irrelevant; that is as far removed as black is from white, and serving no purpose whatsoever.

Judge THOMPSON.—The Court overrules the objection.

Mr. RUSSELL.—Note an exception.

Q. Is there any authority for the statement that the injury that would result from the action of muscle acting on this tubercle would be offset by the counter-irritation that would be set up by the same?  
[298—159]

A. No. There is no authority that I know of for that. All the authorities say that we must put that muscle to rest so it won't further increase the in-

(Testimony of L. L. Sexton.)

jury; that is not counter-irritation but direct irritation. That would rather increase the injury by walking around rather than offsetting it.

Q. Would, Doctor, the introduction of irritation into this process, whether the irritation be direct or indirect, be a necessary or advisable part of the treatment? A. No.

Q. Doctor, would the substitution of a tight rubber band in place of the adhesive plaster bandage, be an improvement on the treatment which you have said is not only not recognized, but recognized by medical authorities as wrong?

A. The substitution of the tight rubber band instead of the adhesive bandage—I think I would rather have the adhesive bandage. I think it would be less injurious than the rubber bandage, and the rubber bandage would not be a benefit, I think.

Judge THOMPSON.—Doctor, do you speak from experience or from theory? A. Both.

Q. Doctor, you have testified that in case it became necessary to keep the patient in bed for three or four weeks, or longer, any danger of ankylosis could be avoided by manipulation of the joint would be a necessary part of the treatment, I would ask would there be any danger of the patient suffering from atrophy of the limb, through being kept in bed under the treatment you have described, for several months?

A. Whenever the muscles are not exercised there is bound to be atrophy. A man stays in bed for twenty-four hours, there is a certain amount there.



(Testimony of L. L. Sexton.)

The longer he stays in bed [299—160] the longer the muscles are inactive and the body is not assuming its normal amount of exercise, there is a certain amount of atrophy there.

Cross-examination of Witness by Mr. RUSSELL.

Q. Doctor, you and Doctor Osorio are not on very friendly terms are you? A. Not that I know of.

Q. You and he don't speak to each other?

A. Not so far as I know.

Q. Is it not a fact that you and he have not exchanged any conversation other than that which is necessary in connection with your practice in the hospital?

A. Why only two days ago I was talking to him, not very much.

Q. Is it not a fact, Doctor, you feel very unfriendly towards him?

A. Doctor Osorio and I have differences, the same as I have differences with every other doctor in town, but I don't hold them up very long.

Q. As a matter of fact do you not feel unfriendly towards Doctor Osorio? A. Why, no.

Q. And have you not expressed yourself as having a dislike for Dr. Osorio?

A. I have, and I guess I have for almost every other man in town on occasions. It lasts temporarily.

Q. As a matter of fact don't you as a rule when passing Dr. Osorio, you don't even look at him?

A. No. [300—161]

(Testimony of L. L. Sexton.)

Q. You know that Dr. Oseorio has been treating this case?     A. Yes.

Q. Fraga was formerly a patient of yours, was he not?

A. Why, one of the children was; about four or five years ago.

Q. How about Mrs. Fraga; did you not operate on Mrs. Fraga?

A. I would not be sure if I did not or did.

Q. And a year or so ago you cut the tonsils of his children?

A. I believe I did. I would not swear to it; I can produce the evidence.

Q. You mean to say that you don't at this time recognize Fraga as being a former patient of yours?

A. I know Fraga; I have known him for years; I don't remember him personally.

Q. How about his family?     A. Yes.

Q. You treated his family?     A. Yes, I have.

Q. And that at the present time, having attended the members of his family and seen them within the past year, you have not been called in for his family?

A. I think it has been longer than that.

Q. Now, Doctor, with reference to these plates, you say that the one taken on September 4th and the one taken on March 4th, you were away were you not?     A. Yes.

Q. Dr. Heck was here?     A. Yes.

Q. As a matter of fact, you don't know when

(Testimony of L. L. Sexton.)

photographs are taken of the patients, that are not your own, you are very rarely present. [301—162]

A. Most of the time I am present, but I don't do any of the work myself.

Q. For instance with reference to the photographs that were taken last Tuesday, were you present? A. Yes.

Q. You saw them taken? A. Yes.

Q. Dr. Osorio was present? A. Yes.

Q. That was the occasion you had reference to when you said you had a talk with him?

A. Yes.

Q. Now you say that as you view the first photograph of September 4th, 1920, you could not discover that there is anything abnormal there, is not that so? A. No.

Q. You could not say from that photograph that it was perfectly normal? A. No.

Q. With reference to the second photograph, that of March 4th, you say that you cannot tell if there is anything abnormal? A. Yes.

Q. But you would not say that you can tell if there is anything abnormal in one of the plates? In other words there may be an abnormal condition present in the leg that was photographed on September 4th, and there may be an abnormal condition in the leg photographed on September 4th, neither you or any other surgeon by an examination of those photographs can say that they can see that abnormal condition?

(Testimony of L. L. Sexton.)

A. From examining it by itself I would not say that it is normal or abnormal. [302—163]

Q. We get down to the last photograph, as there were three occasions when photographs were made. Your opinion is, as I take it, that from an examination of the two photographs taken this last time, last Tuesday, and because of the fact of comparison of the leg at the time, you can say there is nothing of the right leg at the time, you can say there is nothing abnormal there, nothing wrong there?

A. Yes.

Q. That is due to the fact that they are absolutely alike, due to the fact that they belong to the same individual, only difference being different legs, and that they are alike in the amount of separation which is the point under discussion; in order to make a comparison you have to take a photograph of each leg in the corresponding individual position? A. Yes.

Q. The angle would have to be the same?

A. Yes.

Q. The focus would have to be from the same point? A. Yes.

Q. The focus of the X-ray would have to be the same? A. Yes.

Q. So that you could see the same picture of each leg from the same angle and standpoint?

A. Yes.

Q. And when they are identical then you know that there is a normal condition?

A. Identical within certain minors.

Q. If there is a difference such as any layman

(Testimony of L. L. Sexton.)

can see, this would suggest some abnormal condition.

A. Well, now, an X-ray plate is one of the most deceiving things, if it is not understood and a difference might be looked upon by an experienced person, *like* a scratch on the plate would be drawn out immediately, by someone who understood the plate. [303—164]

Q. Laying aside certain indications that are apparent to be defects in the plate itself, any difference would suggest an abnormal condition or state?

A. Why, to an inexperienced eye it might be and to an experienced eye it might not be.

Q. It is a matter of photography? A. No.

Q. Let us assume that a photograph of a right leg or right knee is different in photography, that the picture of it is different from that represented by the picture of the left knee, then that would suggest something wrong?

A. Unless you can account for the difference in position and account in the other plate a number of details that enter in the reading of a plate.

Q. I will ask you another thing. Is it not a fact that a surgeon is sometimes not assisted by an X-ray unless he has a knowledge of existence of that condition? A. Yes.

Q. So that a condition that would not be recognized by a surgeon who is a stranger to the case might be recognized by a surgeon of the same ability, who has a familiar knowledge of the case?



(Testimony of L. L. Sexton.)

A. Knowledge and the X-ray, they are taken together.

Q. Is it not a fact that a surgeon who is a stranger to the history of a certain case in examining a photograph of that case may not recognize the particular condition that exists there, but another surgeon, who by reason of the fact that he has treated that case, handled it, and knows its history, and knows the other symptoms may be able to recognize from that same plate? A. Yes.  
[304—165]

Q. So that the fact that when you examine a plate and see no abnormal condition there, does not mean that a physician who has handled only is familiar with the case may see an abnormal condition from that same picture?

A. I don't believe that is true; my previous statement applies to, was X-ray work in general, it must be taken with the history and locality and each one has its particular case.

Q. Is it not a fact that the text-books in describing methods of diagnosis of fractures of the bones, or separations of the epiphyseal prescribe the X-ray as one of the methods to be resorted to after certain methods have been applied?

A. No. It is one of the first things used altogether in diagnosing.

Q. You recognize Keene's work? A. I do.

Q. Is it right that the order of examinations would be first an examination of the general condition, examination for shocks, loss of blood or injury. In-

(Testimony of L. L. Sexton.)

spection of injured parts, this is done before the X-ray is taken, is that the order?

A. I don't know that there is any definite order in making examinations of that kind.

Q. If Keene says so, it would be correct, would it not? A. I suppose so.

Q. Now, Doctor, I will show you these plates, and ask you if you recognize those as being the plates taken on the 24th?

A. (Judge STANLEY.) If the Court please, before this question is put, I would like to have the last question put to the witness. Counsel states to the witness that this book Keene states that a certain order should be followed, whereas the page that he is reading from says that the order [305—166] of examination can be varied according to each individual case.

Mr. PATTERSON.—No use to discuss that, it is merely for the jury. The Court has ruled on that.

Q. Do you recognize those as taken on the 24th, and the other being the right and one of them the left leg. Is there anything abnormal in either of these pictures?

A. There is not enough difference of one from the other to show anything abnormal.

Q. That is, you would not, if you recognized an epiphyseal separation difference of one-sixteenth inch, you would not say that there is enough variance to suggest an abnormal condition?

A. What might appear in one plate may be 1/4",

(Testimony of L. L. Sexton.)

taking into consideration the angle in which it was taken, and unless both pictures were taken at the same angle a person would not be able to say absolutely that there was any difference.

Q. Then you mean, Doctor, do you that because those photographs are not identical you cannot say by a comparison that an abnormal condition exists there?

A. I know enough about these pictures and other pictures that I have seen to know that every one little bit more would bring it back that much, or absolutely alike.

Q. You mean to say that if there was a difference in the tubercle separation there of a  $1/16''$  that you would not see it from those photographs?

A. I think you would.

Q. You will say that there is not that difference?

A. There is not.

Q. You pointed out to the jury that in one of these that is in the 1014 one, there is a separation that seems to be direct toward the outer surface and that does not appear in the right? A. Yes.  
[306—167]

Q. Would that suggest to you some point of inquiry? That there may be something wrong there?

A. I know it was taken on a little different angle, if you turned it around that crack would show like this one.

Q. Now, Doctor, is it not a fact that that separation in 1016, a little wider than the separation in 1015 or in 1014?

(Testimony of L. L. Sexton.)

A. The amount of dark area that you can see there is greater, but the separation of the tubercle from the shaft is not any greater.

Q. And the reason for that is account for by the fact that it was taken from a different angle?

A. Yes.

Q. Is this true that if one sought to reconcile a condition of one leg with a condition of another because of the difference of  $1/16''$ , it could be easily accounted for by the difference in the angle?

A. Yes.

Q. Is it not a fact, Doctor, that you, in giving your opinion upon this matter, you were seeking, honestly so, a—to effect a reconciliation of those two photographs? A. Yes.

Q. Now you say, Doctor, that you never heard, or rather that you know that a separation, tubercle separation, or a tubercle epiphyseal separation is ordinarily and usually cured in a few weeks?

A. That is what the authorities say.

Q. Now you also say, Doctor, that it is not true that if it is not cured within a course of a few weeks, that it can't be cured until the age of between 20 and 24?

A. I can't see any reason for a statement of that kind. [307—168]

Q. Now, this has been referred to as a partial separation of the epiphysis, now a complete separation is a much more serious thing is it not?

A. Yes.

Q. Can you see any reason why with a complete

(Testimony of L. L. Sexton.)

separation of the epiphysis, that if it is not cured in a few weeks it cannot be cured at all

A. That is another proposition altogether.

Q. Is that probable?

A. It depends on how much separation and how much overlapping there is; it depends on a great many things, and how formidable the fracture is.

Q. And if that is not cured in a matter of a few weeks that it cannot be cured, if there are evidences of a partial separation of the epiphysis of the tubercle?

Judge STANLEY.—I object to the question.

Judge THOMPSON.—The Court overrules the objection.

Judge STANLEY.—Note an exception.

A. That it cannot be cured in a few weeks—the upper epiphysis of the tibia. I believe that it can never be cured or not—I have never seen a case. I don't know whether that would be so or not. It would take a great deal longer and probably would be a long time.

Q. As a matter of fact is it not a fact that a complete separation of the epiphysis is a fatal injury?

A. I don't believe that it is a permanent—that it is usually fatal.

Q. (Mr. RUSSELL, reading from book, Keene's surgery.) Sometimes fatal, often fatal; sometimes causes death; does not fatal mean death?

A. It means causing death.

Q. Can you cut the leg off and save the rest of the body? [308—169]



(Testimony of L. L. Sexton.)

A. I presume by that statement that the separation would be of the entire epiphysis, would be as a railway train running over the bone and it is taken off at that point; there are other conditions along with it though.

Judge STANLEY.—I object to this line of examination, if the Court please; counsel holds a book in his hands and has cited that this separation is a serious and often fatal injury, and uses some other language.)

Q. I will have to ask you this question, I want to be fair to the witness: Is it not a fact that the separation of the upper epiphysis of the tibia is like—is a serious and often fatal injury?

A. I believe you are reading.

Q. By fatal injury, that is an injury that cannot be cured?

A. The medical term fatal injury means causes death.

Q. In your opinion would the separation of the epiphysis be a fatal injury, complete separation, would that cause death?

A. I would not have thought so unless, I would not have thought as formidable a thing as that, as it takes an awful shock to tear it loose; it probably refers it to—

Q. Now, Doctor, not knowing whether it is out of the book or not, or any other source, what is your professional opinion.

Judge THOMPSON.—We will settle the question but you both were *both* dodging around the question.

(Testimony of L. L. Sexton.)

Q. Doctor, is it not a fact that within the past two or three years, that treatments in connection with injuries to the joints, fractures, has been revolutionized to a considerable extent? A. Yes.

Q. Do you ever read De Page's works? [309—170] A. Not that I recall.

Q. Do you recognize him as a recognized authority? A. Yes, I have read extracts of his works.

Q. Does he not advocate greater mobility of joints and injuries, and injured legs, greater mobility of the joints than was prescribed by physicians of the older school?

A. Oh, yes. All of the surgeons are getting around that way all the time.

Q. The treatment resorted to by the surgeons, is considered very good is it not, Doctor?

A. Yes.

Redirect Examination of Witness by Judge  
STANLEY.

Q. You said, Doctor, that it was not your purpose in examining these plates and making comparisons to go out of your way, to look for reconciliations as between the right and left photograph that—

Mr. RUSSELL.—I object if your Honor please. I submit there was no such statement.

Judge THOMPSON.—I sustain the objection.

Q. (Mr. RUSSELL.) In that connection, Doctor, are you not here under pay of the defendant?

Judge THOMPSON.—You need not answer that question.

(Testimony of L. L. Sexton.)

Mr. RUSSELL.—One of the questions to show bias of witness.

Mr. RUSSELL.—I note an exception.

Q. Not all injuries to bone would show in an X-ray would they? A. I believe they all will.

Q. Without regard to the method of taking the photograph?

A. No. If the photograph is not taken properly it may conceal a part or even a slight injury, or all of the injury to the part. [310—171]

Q. In other words, photographs are taken with a view to have such photograph show that particular part suspected? A. Yes.

Q. By whom, Doctor, were the photographs taken, the plates numbered 1014, 1015 and 1016 and 1017? A. They were taken by my operator.

Q. Who is that? A. Alfred Souza.

Q. Doctor, you say that Le Page and all of the modern schools of doctors, recommend greater mobility of joint than the older schools? A. Yes.

Q. Do any of them recommend the treatment which you have stated here was not only not regarded as right but was regarded as wrong?

A. I don't believe they do.

Judge THOMPSON.—Have you any other witnesses, Judge Stanley.

Judge STANLEY.—I intended to call Dr. Irwin, but he was called over to Waimea and will not return until half past eleven to-night.

Judge THOMPSON.—How long will you probably take to get through with the defendant's case?

Judge STANLEY.—He will be my last witness.

Mr. RUSSELL.—We have nothing for rebuttal, don't think so, unless Dr. Irwin should surprise us. If the Court please, Dr. Irwin was in court to-day; we would like to finish this case this evening, as we have a case set in the Supreme Court for Saturday, and we would like to finish this case so that we can arrange to leave for Honolulu by tomorrow morning's "Mauna Kea."

Mr. PATTERSON.—If the Court please, when Dr. Irwin was [311—172] here this morning he did not know anything about being called to Waimea.

Judge STANLEY.—If the Court please, Mr. Patterson brought the note to me and knew what it contained.

Mr. PATTERSON.—I will state that Judge Stanley went up to your Honor's desk with the note, and I knew not what it contained, and he did not show it to me.

Judge STANLEY.—If your Honor please, it is not usual to have medical men who are engaged in treating the sick to be in attendance on the Court at all times, and for this reason I did not subpoena Dr. Irwin, but to bring them into court whenever they are needed to testify. I ask that we stand adjourned from twenty minutes to six until nine o'clock to-morrow morning for the purpose of enabling me to call the witness Dr. Irwin to the stand.

Mr. PATTERSON.—That doctor was in court this morning.

Mr. RUSSELL.—What do you expect with Dr. Irwin.

Judge STANLEY.—Practically the same as Dr. Sexton. It would be along the same lines and I am perfectly willing to say and I expect him to testify along the same lines as Dr. Sexton has testified.

Judge THOMPSON.—Mr. Patterson, when is your case set for in the Supreme Court?

Mr. PATTERSON.—At 10 o'clock on Saturday, and I leave by to-morrow's boat.

Judge THOMPSON.—Gentlemen, I don't believe that I have been as indulgent before, and I promise not to be again. See what trouble it gets the Court in. I am expected to rule and the matter will go to the Supreme Court for final hearing. Condemnation falls on the Court one way or the other. The Court is not to blame. [312—173]

The difficulty could be avoided if counsel will admit that the testimony which Dr. Irwin will give will be the same as testified to by Dr. Sexton, and of the same general effect as Dr. Sexton would so testify.

Judge STANLEY.—With that admission I am ready to go on when your Honor says so.

Mr. RUSSELL.—Then may I make this statement: If the defendant will admit that if Dr. Irwin was called as a witness he would testify to the same effect as Dr. Sexton, and we will have no rebuttal.

Judge STANLEY.—We admit that his testimony would be the same as Dr. Sexton's. [313—174]



Territory of Hawaii,  
Fourth Judicial Circuit,—ss.

I hereby certify that the foregoing is a true, complete and accurate transcript of my stenographic notes of the testimony, objections, rulings, exceptions, motions, etc., in the above-entitled cause.

GEORGE K. MILLS.

Acting Official Reporter, Circuit Court of the Fourth  
Judicial Circuit, Territory of Hawaii.

[Endorsed]: 15 L. No. 791. Doc. 3, pg. 213.  
Margaret Fraga, by Alfred Fraga, Her Guardian  
*ad Litem*, vs. Hoffschlaeger Co., Ltd. Transcript  
of Evidence. Filed at 10 o'clock A. M. August 4,  
1921. T. J. Ryan, Clerk. No. 1360. Rec'd and  
filed in the Supreme Court, December 17, 1921, at  
9:50 A. M. J. A. Thompson, Clerk. [314]

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In the Circuit Court of the Fourth Judicial Circuit,  
Territory of Hawaii.

DAMAGES.

MARGARET FRAGA, by ALFRED FRAGA,  
Guardian ad Litem,

Plaintiff,

vs.

HOFFSCHLAEGER COMPANY, LIMITED,  
Defendant.

**Defendant's Bond on Motion for New Trial and on Appeal.**

(Under Sections 2535-2538, R. L. 1915.)

KNOW ALL MEN BY THESE PRESENTS:

That Hoffschlaeger Company, Limited, an Hawaiian corporation, as principal, and Hartford Accident and Indemnity Company, a corporation duly organized under the laws of the State of Connecticut (authorized to do a surety business in the Territory of Hawaii, and having its Honolulu office with the American Factors, Limited, in Honolulu, in said Territory) as Surety, are held and firmly bound unto James A. Thompson, Esquire, Clerk of the Supreme Court of the Territory of Hawaii, and his successors in said office, in the sum of Seven Thousand Five Hundred Dollars (\$7,500) to be paid to the said Clerk or his successors in said office, for the benefit of such person or persons as may be entitled to a recovery hereunder, for the payment of which, well and truly to be made, they do hereby bind themselves and their respective successors jointly and severally, firmly by these presents.

Signed and sealed at Honolulu, Territory of Hawaii, the [315] 3d day of June, 1921.

THE CONDITION of the above obligation is such that whereas the above-named Margaret Fraga, as plaintiff in the above-entitled action, has recovered a judgment therein against the said Hoffschlaeger Company, Limited, as defendant, in the

sum of **Seven Thousand Five Hundred Dollars** (\$7,500) upon the verdict of a jury rendered in said action, on the 27th day of May, 1921, and the said defendant, named as principal on this bond, has filed or is about to file a motion for a new trial of said action and to file and prosecute a bill of exceptions or writ of error in said action, to the Supreme Court of the Territory of Hawaii, and desires a stay of execution pending the said proceedings on appeal:

NOW, THEREFORE, if the said Hoffschlaeger Company, Limited, as defendant and appellant as aforesaid shall pay all costs of the said motion for a new trial in case the same shall not be sustained, and all costs which shall or may subsequently arise or otherwise accrue and be awarded against it in said action or on said appeal, until the final termination thereof, and pay such final judgment as may be recovered against it in said cause, and shall not, to the detriment of said plaintiff or obligee in this bond remove or otherwise dispose of any property it may have liable to execution, and in all other respects abide by and perform such final judgment as may be entered in said cause, then this obligation shall be void; otherwise the same to remain in full force and virtue.

IN WITNESS WHEREOF said principal and surety herein named have caused this instrument

to be duly executed in their corporate [316]  
names and behalf on this 3d day of June, 1921.

HOFFSCHLAEGER COMPANY, LIMITED

By H. G. DANFORD, (Seal)

Its Vice-President.

By HANS M. GITTEL,

Its Scty. & Treas.

HARTFORD ACCIDENT AND INDEM-  
NITY COMPANY.

By SHERWOOD M. LOWREY.

The amount of the penalty and the sufficiency of  
the surety of the foregoing bond are hereby ap-  
proved this 14th day of Nov. 1921.

J. W. THOMPSON,

Acting Judge Circuit Court, Fourth Circuit.

[Seal]

Attest: A. K. AONA,

Clerk, Circuit Court, Fourth Circuit.

[Endorsed]: 13 L. No. 791. Doc. 3, pg. 213.  
Circuit Court, Fourth Circuit, Territory of Hawaii.  
Margaret Fraga, by Alfred Fraga, Guardian *ad*  
*Litem*, Plaintiff, vs. Hoffschlaeger Company, Ltd.,  
Defendant. Defendant's Bond on Motion for New  
Trial and on Appeal. Dated: ———, 1921. Filed  
3:16 o'clock P. M., June 6, 1921. T. J. Ryan, Clerk.  
C. F. Parsons and Smith, Warren & Stanley, At-  
torneys for Defendant. No. 1360. Rec'd and filed  
in the Supreme Court December 17, 1921, at 9:50  
A. M. J. A. Thompson, Clerk. [317]

In the Supreme Court of the Territory of Hawaii.  
October Term, 1921.

No. 1360.

MARGARET FRAGA, by ALFRED FRAGA,  
Her Guardian ad Litem,  
vs.

HOFFSCHLAEGER COMPANY, LIMITED.

ERROR TO CIRCUIT COURT, FOURTH CIR-  
CUIT.

Hon. J. W. THOMPSON, Judge.

Argued August 4, 1922.

Decided September 13, 1922.

PETERS, C. J., EDINGS and PERRY, JJ.

Statutes—Constitutionality—Substitute Judges.

Section 2277, R. L. 1915, which provides that the Chief Justice of the Supreme Court may, in the case of a vacancy in the office of Circuit Judge of one of the circuits authorize a Circuit Judge of another circuit to preside at the trial of any pending cause, is not in conflict with Sec. 80 of the Organic Act, which provides that the President shall nominate and by and with the advice and consent of the Senate appoint the Judges of the Circuit Courts.

New Trial—Misconduct of Jurors—Newspaper Comments.

Not every newspaper publication relating to a case on trial furnishes ground for a new trial.



The result must depend upon the circumstances of each particular case.

Same.

A newspaper publication to the effect that the defendant corporation in a pending action for damages for negligence is protected by accident insurance and that the insurance company offered to settle for a small amount, which article [318] was published without the direction or knowledge of the plaintiff or her attorneys, is not *per se* ground for a new trial or for the entry of a mistrial.

**Trial—Withdrawal of Juror—Discretion of Trial Court.**

A motion to withdraw a juror and to enter a mistrial is in the sound, judicial discretion of the Trial Judge and his ruling thereon will not be disturbed in the absence of an abuse of discretion.

**Evidence—Opinion—Standard Treatises—For Purposes of Contradiction.**

Where an expert witness gives in evidence his opinion as to the probable length of time that will elapse before a patient will recover from injuries received in an accident and in cross-examination names certain authors as supporting his opinion, it is not error for the trial judge to refuse, on the cross-examiner's request, to order the witness to leave the courthouse, procure the books referred to, return to the stand and search for and point out the passages supporting his opinion,—the witness and

opposing counsel offering to place the books at the cross-examiner's disposal and to permit a recall of the witness at any time for further cross-examination.

Negligence—Contributory    Negligence—Care    Required.

A girl of thirteen cannot be said, as a matter of law, to be guilty of contributory negligence merely because, while walking on a sidewalk adjoining a public highway, she permitted her attention to be momentarily diverted to the opposite sidewalk by the voice or call of another person and in consequence of this distraction fell into a freight elevator pit left by the defendant open and unguarded. [319]

### **Opinion of the Court by Perry, J.**

This is an action for damages for the negligence of the defendant corporation resulting in physical injuries to the plaintiff. The jury rendered a verdict in favor of the plaintiff for the sum of \$7,250. The case comes to this court on a writ of error. The more important assignments of error will be considered in detail.

The case was tried in Hilo in the Fourth Judicial Circuit of this Territory at a time when a vacancy existed in the office of Circuit Judge of that circuit. The trial was presided over by the Honorable J. W. Thompson, Judge of the Circuit Court of the Third Judicial Circuit, upon the written request and authorization of the Chief Justice of this court. One assignment of error is that this request and authorization were invalid because, as it is said, the statute

purporting to provide for such temporary grants of authority is in conflict with the Organic Act of the Territory and therefore void. The statute under which the chief justice acted in requesting Judge Thompson to "preside at the trial of any cause or causes pending in the circuit court of the fourth circuit" is R. L. 1915, section 2277, which reads as follows: "Whenever on account of disqualification, inability to attend, vacancy in office, or any other cause or causes, there shall be no judge of the circuit court of any particular circuit who can preside at the trial of any cause pending in such court or in chambers in such circuit, or at any term of such court, a Circuit Judge of some other circuit who shall be thereto authorized by the written request of the Chief Justice, may preside at the trial of such cause, or at such term, as the case may be." It is not contended that the Chief Justice's request and authorization to Judge Thompson were not in pursuance of, or in conformity with, the provision of this statute. The only contention is that the statute is in contravention of section 80 of the Organic Act, which reads as follows: "That the [320] President shall nominate and, by and with the advice and consent of the Senate, appoint \* \* \* the Judges of the Circuit Courts, who shall hold their respective offices for the term of four years, unless sooner removed by the President." In our opinion the objection is not well founded. In acting as he did the Chief Justice did not appoint or endeavor to appoint any one as a Judge of the Circuit Court of the fourth

circuit; nor does section 2277 purport to authorize the appointment of a judge of any circuit in case of a vacancy. All that the statute purports to do is, and all that the Chief Justice did under that statute was, to authorize a Judge of another circuit, who was duly appointed to his office by the President and Senate of the United States, to temporarily perform certain duties within the ordinary territorial jurisdiction of the fourth circuit. The statute and the designation by the Chief Justice both recognize that a vacancy exists in the fourth circuit and both proceed upon the theory of such vacancy. Neither attempts to provide for or to make an appointment of a Judge of the fourth circuit. Neither purports or attempts to in anywise limit the powers granted by section 80 of the Organic Act to the President or to the Senate of the United States. Both proceed upon the assumption that in due course the power of appointment referred to in section 80 of the Organic Act will be exercised by those who are by that act vested with the power so to do. There is no conflict between R. L., section 2277, and section 80 of the Organic Act.

On the afternoon of the first day of the trial before the jury a newspaper published in Hilo published an article reading as follows:

**“FOURTEEN-YEAR-OLD HILO GIRL SEEKS  
\$11,500 DAMAGES FROM INSURANCE  
FIRM FOR INJURIES.**

“Pretty Miss Margaret Fraga, fourteen-year-old Hilo school girl, fell down a sidewalk elevator shaft,

owned by the Hoffschlaeger Company, Ltd., last August. [321]

“When her case was called in the Circuit Court this morning she asked for \$11,500 damages for injuries which she declares she suffered from her fall, from which she declares that she has never entirely recovered.

“Shortly before noon, the trial jury was completed and the beginning of testimony will start when court convenes this afternoon.

“Unusual Circumstances.

“The circumstances surrounding the cases are rather unusual. According to the Insurance company, which is defending the case for the defendant, it is admitted that Miss Fraga was walking along Keawe Street and fell down the elevator shaft, but they declare that the complainant did not suffer serious injuries. It is reported that the Insurance company, at the time of the accident, agreed to settle for a small amount of damages. It is admitted that half of the iron grating, which was supposed to cover the shaft, was left unguarded.

“Miss Fraga declares that her injuries, both physical and mental, were so serious that she has not entirely recovered. The twelve men who were selected to hear the evidence in the case are as follows: James Davis, George H. Akau, John Kahiawi, Antone J. Kimi, James Kauhulapua, Charles Johnson, T. O. Mitchell, E. B. Hamauku, A. Arasuda, S. K. Maka, E. A. Namohala and Harry Hapai.

“Questions Jurisdiction.

“Judges William L. Stanley and Charles F. Par-



sons are appearing for the Insurance Company, who are shouldering the responsible for the Hoffschlaeger Company. It is expected that this case will require two days.

“Yesterday, when the case was first called, Judge W. L. Stanley filed a motion that Judge Thompson had no jurisdiction to hear this case. The motion was overruled and the case was continued until this morning.”

On the first day of the trial evidence had been presented to the jury after the noon recess only. Upon the opening of court on the second day of the trial counsel for the defendant presented a motion for the withdrawal of one juror and for the entry of a mistrial, basing his motion upon the ground of the newspaper publication of the article above quoted. Affidavits for and against the motion was filed and the motion was denied by the presiding Judge and the trial proceeded. After verdict for the plaintiff the defendant in support of a motion for a new trial, based *inter alia* upon this same ground of the appearance of the publication in the local paper, presented additional affidavits upon the subject. The motion for a new trial was denied by the presiding Judge. [322]

In support of the errors assigned in connection with the denial of these two motions it is contended that the publication of the article was prejudicial to the defendant in that the article states, first, that an insurance company was the real defendant and was “shouldering” defendant’s case and the responsibility involved, and, second, that the insur-

ance company had agreed to settle the claim of the plaintiff for a small amount of damages.

It is well settled that not every newspaper publication relating to a case on trial furnishes ground for the granting of a new trial. The result must depend upon the circumstances of each particular case including the nature of the article and the prejudice which it is likely to have caused to the losing party. It cannot be doubted that if in the case at bar the publication had been made prior to the impaneling of a jury for the trial of the case and if under those circumstances the prospective jurors had been examined on their *voir dire*, as to the reading of the article, as to the impressions that it made upon them and as to whether or not they were able to discard those impressions, if any, and to try the case solely upon the evidence as it should be adduced at the trial and upon the law as it might be given to them by the presiding Judge, and had answered, satisfactorily to the Court, that either the article had not been read or had left no consequential impression upon them or that they could discard those impressions, and try the case solely upon the law and the legal evidence, no juror thus answering satisfactorily could have been successfully challenged. Under those circumstances every such juror would be perfectly eligible to sit at the trial of the case. Intelligent jurors throughout the land are presumed to read newspapers and to read in them not only other current news but also reports of accidents and other facts involved in controversies which may later become the sub-

ject of judicial investigation. No one [323] is in this jurisdiction successfully challenged nowadays on the mere ground that he has read something in the newspapers relating to the case on trial. 20 R. C. L., p. 254, sec. 36; 2 Thompson on Trials, sec. 2561. The examination is always pursued further to ascertain whether in spite of the reading the proposed juror is able to give both parties a fair trial purely upon the law and the evidence. In the case at bar the defendant did not avail itself of the opportunity, which it had in conformity with correct and well-recognized procedure, to ask at the opening of the second day's session of the court that the trial be suspended and the jurors re-examined in order to ascertain how many, if any, of them had read the article in question, how many, if any, had received from the article impressions as to the merits of the case on trial and how many, if any, were not able to sit with unprejudiced minds in the further trial of the case. *Marrin vs. United States*, 167 Fed. 951, 953; *Lindsey vs. Tioga Lumber Co.*, 32 So. (La.) 464, 466; *Copeland vs. Ry. Co.*, 75 S. W. (Mo.) 106, 114, 115; *State vs. Hoffman*, 45 So. (La.) 951, 955. Most, if not all, persons available as jurors nowadays are familiar with the business practice of corporations and individuals of securing themselves against loss from accidents due to the negligence of themselves and of their servants and agents by taking out insurance with companies existing for the purpose. It would not be good ground for challenge of a proposed juror that he knew or had read in advance of the trial

that the defendant in any given case was thus secured by insurance provided he could answer with satisfaction to the Court that he could easily obey the instructions of the Court that that fact should not affect his verdict one way or the other. Similarly, as to a published suggestion that a compromise had been offered, whether that suggestion stands by itself or in combination with a reference to insurance. In the case at bar the defendant had the opportunity already adverted to [324] to re-examine the jurors as to their knowledge of their duty in this respect. We venture to say that in all probability had such an examination been had it would have been found that the jurors understood their duty in the premises and were qualified to continue sitting as jurors in spite of the fact that they had read the article in question. It is worthy of note in this connection that although a period of two weeks elapsed from the appearance of the article until the filing of the motion for a new trial the defendant was unable to show that more than one juror had read the article during the trial or that that juror had been influenced by what he read. To permit a losing party to content himself with a mere motion to withdraw a juror and to enter a mistrial, without an immediate examination of the jurors to ascertain their state of mind due to the appearance of the newspaper article, would be to encourage him to take chances on the verdict of the jury, preserving an exception based upon a supposed state of facts not as clearly disclosed by any means as it might have been had there been an im-



mediate examination of the jurors. As was said in *Partello vs. Missouri Pacific Ry. Co.*, 145 S. W. (Mo.) 55, 58: "It was competent for the defendant to have shown then, by an examination of the jurors, whether or not an opinion had been formed, or whether the jurors had been or would be influenced by having read the newspaper article. This the defendant did not do and it would not do to permit a party to take the chance of a favorable verdict and failing in that to claim the existence of prejudice of jurors which he failed to show when he had the opportunity. \* \* \* When the Court made the ruling nothing was shown more than the mere reading of a newspaper article bearing upon the case by two jurors and that alone was not enough to warrant the court in discharging the jury." See also *Shaffer vs. Ry. Co.*, 201 S. W. (Mo.) 611, 615.

It is true that in many cases in New York, Illinois and [325] perhaps other states it has been held that the mere statement, direct or indirect, by counsel to or in the presence of the jury that the defendant is protected by accident insurance is reversible error. This is an extreme view and does not appeal to us as sound. We do not care to follow it. We think that with a possible occasional exception due to particular circumstances ordinary cautionary instructions would cure what otherwise might be error. There are other cases, of course, which hold that cautionary instructions do cure. See for example, *Holt vs. Manufacturing Co.*, 98 S. E. (N. C.) 369, 370, 371. There is a difference worthy



of mention between evidence, offers of evidence and argument adduced in court, on the one hand, and newspaper publications out of court, on the other hand. The latter, it may well be presumed, would not have the same effect upon a jury as the former. *Hollenbach vs. McCord*, 132 S. W. (Mo.) 1189, 1190, 1191. Nor was there any evidence in the case at bar tending to show that the plaintiff or her attorneys or anyone else in her behalf caused the publication in question to be made. The only evidence on the subject is to the effect that the plaintiff's attorney did not cause the publication and the Trial Judge so found as a fact.

A motion to withdraw a juror and to enter a mistrial, even if a correct form of procedure in this jurisdiction, is at best addressed to the sound judicial discretion of the Trial Court. *Marrin vs. United States*, *supra*; Fed. Cas. No. 14,858; *Per-rung vs. Supreme Council*, 93 N. Y. S. 575, 578; *Heiler vs. Storage Co.*, 105 Atl. (N. J.) 233. We cannot find that in denying the motion the Trial Judge in the case at bar abused his discretion. Whether in this jurisdiction a motion of this kind (for the history of this method of procedure, which originated in a fiction, see *Usborne vs. Stevenson*, 48 L. R. A. (Ore.) 432, 435, 438) can be entertained in the absence of reason [326] shown why any particular juror should be excused or should not be permitted to longer serve in the case is a question that need not be decided in this case. For other reasons already stated the motion in this instance was correctly overruled.

The accident in question in this case consisted in the plaintiff's falling into a freight elevator shaft in a sidewalk adjacent to one of the public highways of Hilo. Half of the iron grating or door over the shaft had been left open by the defendant or its servants for the discharge of freight and the opening had been left unguarded and unprotected in any way. The plaintiff was thirteen years of age, had been walking on the sidewalk in the direction of the elevator-pit and a second or two prior to the fall had had her attention diverted to the opposite side of the street by the voice of another. It was during this momentary distraction that she fell. On behalf of the plaintiff the physician who attended her immediately after the accident and for some weeks thereafter testified at length concerning the nature and the extent of her injuries and the probability as to the time that would elapse before she could recover completely from an injury in the general locality of one of the knees. Testifying that as complete recovery had not happened within a stated time (three or four weeks) he gave it as his opinion that she would not recover until some time between her twentieth and twenty-fourth year of age. Pressed on cross-examination for reasons in support of these views, he named certain writers of medical works as authorities in support of his opinion. Counsel for the defendant thereupon asked the witness to produce the books written by these authors, which he (the witness) had said were at his home or at his office in Hilo, and asked the Court for an order compelling the

witness to obtain and produce these books in order that counsel for the defendant might ask the witness to point out the passages [327] supporting his testimony. The motion was denied and the request disallowed. At that time, however, the witness informed counsel for the defendant that the books at his home and office were at counsel's disposal and counsel for plaintiff made the offer, and asked that it be placed of record, that the plaintiff would consent to the recall of the witness at any time by counsel for the defendant for further cross-examination. In so far as the record shows none of these offers was availed of by counsel for the defendant. No offer was subsequently made in court to show from the books that they did not support the witness' opinion or that they contained passages to the contrary.

The refusal of the Court to order the witness to procure the books at his home or office and to produce them to counsel for further cross-examination is assigned as error. This assignment cannot be sustained. The general rule seems to be well settled that medical books are not admissible as evidence of the truth and correctness of the statements and views therein contained. 8 Ency., Pleading and Practice, 768, 769; 3 Wigmore on Evidence, sec. 1700; 22 C. J., sec. 831. It seems to be equally well settled that when a medical expert cites a book as authority for his statement passages in the book to the contrary may be shown him in cross-examination and further questions asked of the witness which are intended to bring forth an admission

that the witness was in error. Same authorities. But counsel in the case at bar sought to go further than this. He did not produce any books, he did not confront the witness with any passages in conflict with his testimony, but he sought to have the witness compelled to leave the stand and proceed to his home or office to obtain the books, return with them to the courthouse and then to search for passages tending to confirm the opinions advanced by him in evidence. The most that can be said in favor of the defendant [328] in this respect is that the matter was at best in the discretion of the Trial Judge and that that discretion having been exercised in the way that it was no reversible error is to be found in the ruling.

Another assignment of error is that upon the undisputed evidence the plaintiff was guilty of contributory negligence in permitting her attention to be distracted to the opposite side of the road and in not at all times keeping her eyes fixed on the sidewalk ahead of her sufficiently to discover the opening which was there. The evidence is indeed undisputed on this point. The plaintiff was a minor thirteen years of age. She had often passed along this same sidewalk and had seen the freight elevator and its covering. It was during the momentary diverting of her attention by the call from the opposite sidewalk that she fell. The degree of care required of a child is different from that required of an adult. A child is "only required to use the care appropriate to his age, experience and mental capacity." *Ry. Co. vs. Heaton*,



191 Fed. 24, 26. See, also, *Long vs. Ry. Co.*, 162 Ia. 11, 21. The degree required of a bright, intelligent child is perhaps different from that required of one less favorably endowed in these respects. The degree of care required of a child of eight is different from that required of a minor of thirteen or sixteen. Common sense and common experience must be resorted to by jurors in determining questions of negligence in the case of minors as well as in the case of adults. It certainly cannot be said that upon the undisputed evidence in this case the jury should have found as a matter of law that the plaintiff was guilty of contributory negligence. It is at least open to grave doubt that if by its verdict the jury had found that the plaintiff was guilty of contributory negligence such a verdict could stand; but certainly a verdict finding her not guilty of negligence cannot be set aside on the ground that it was contrary to the evidence or lacking in evidence to support it. [329]

It is further assigned as error that the verdict was excessive and that it must have been due to bias and prejudice on the part of the jury. The latter part of this contention has reference merely to the newspaper publication and that is already disposed of above. If the jury accepted as true the evidence of Dr. Osorio, who testified on behalf of the plaintiff as to the nature and extent of her injuries,—and it was competent for the jury to do so and to disregard the evidence of another medical expert who testified to the contrary—a verdict in the sum of \$7,250 cannot be held to be excessive or



to contain evidence within itself that it must have been the result of bias or prejudice.

There are other assignments of error relating to so-called restrictions of the right of cross-examination and to the instructions of the Court. Suffice it to say that we have examined them all with care and find no reversible error.

The judgment is affirmed.

W. L. STANLEY (SMITH, WARREN, STANLEY & VITOUSEK, on the brief), for plaintiff in error.

R. J. O'BRIEN and FRED PATTERSON (also on the brief), for defendant in error.

E. C. PETERS.

W. S. EDINGS.

ANTONIO PERRY.

[Endorsed]: No. 1360. Supreme Court, Territory of Hawaii. October Term, 1921. Margaret Fraga, by Alfred Fraga, Her Guardian *ad Litem*, vs. Hoffschlaeger Company, Limited. Opinion. Filed September 13, 1922, at 1:55 P. M. Robert Parker, Jr., Deputy Clerk. [330]

In the Supreme Court of the Territory of Hawaii.  
October Term, 1921.

Error to Circuit Court Fourth Circuit.

No. 1360.

MARGARET FRAGA, by ALFRED FRAGA, Her  
Guardian ad Litem,  
Plaintiff-Defendant in Error.  
vs.

HOFFSCHLAEGER COMPANY, LIMITED,  
Defendant-Plaintiff in Error.

**Judgment.**

In the above-entitled cause, pursuant to the opinion of the above-entitled court rendered and filed on the 13th day of September 1922, the judgment is affirmed.

Dated, Honolulu, T. H., October 27th, 1922.

By the Court:

[Seal]

ROBERT PARKER, Jr.,  
Deputy Clerk Supreme Court.

Approved:

A. P.

[Endorsed]: No. 1360. Supreme Court, Territory of Hawaii. October Term, 1921. Margaret Fraga, by Alfred Fraga, Her Guardian *ad Litem*, Plaintiff-Defendant in Error, vs. Hoffschlaeger Company, Limited, Defendant-Plaintiff in Error. Judgment. Rec'd and filed in the Supreme Court Oct. 27, 1922, at 3:35 o'clock P. M. Robert Parker, Jr., Deputy Clerk. [331]

In the Supreme Court of the Territory of Hawaii.  
October Term, 1921.

Error to Circuit Court, Fourth Circuit.

No. 1360.

MARGARET FRAGA, by ALFRED FRAGA, Her  
Guardian ad Litem,  
Plaintiff-Defendant in Error.

vs.

HOFFSCHLAEGER COMPANY, LIMITED,  
Defendant-Plaintiff in Error.

**Notice of Judgment.**

To the Honorable Judge of the Circuit Court of  
the Fourth Circuit, Territory of Hawaii.

You will please take notice that in the above-entitled cause the Supreme Court has entered the following Judgment:

**“JUDGMENT.**

In the above-entitled cause, pursuant to the opinion of the above-entitled court rendered and filed on the 13th day of September, 1922, the judgment is affirmed.”

Dated, Honolulu, T. H., October 27th, 1922.

By the Court:

[Seal]

ROBERT PARKER, Jr.,  
Deputy Clerk Supreme Court.

The form of the foregoing notice is hereby approved and it is ordered that the same issue forthwith.

Dated, Honolulu, October 27th, 1922.

ANTONIO PERRY,  
Justice Supreme Court.

[Endorsed]: No. 1360. Supreme Court Territory of Hawaii. October Term, 1921. Margaret Fraga, by Alfred Fraga, Her Guardian *ad Litem*, Plaintiff-Defendant in Error, vs. Hoffschlaeger Company, Limited. Notice of Judgment. Rec'd and filed in the Supreme Court Oct. 27, 1922, at 3:35 o'clock P. M. Robert Parker, Jr., Deputy Clerk.  
[332]

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In the Supreme Court of the Territory of Hawaii.  
October Term, 1922.

No. 1360.

MARGARET FRAGA, by ALFRED FRAGA, Her  
Guardian *ad Litem*,  
Plaintiff-Defendant in Error,  
vs.

HOFFSCHLAEGER COMPANY, LIMITED,  
Defendant-Plaintiff in Error.

**Petition for Writ of Error and Supersedeas.**

To the Honorable Chief Justice of the Supreme  
Court of the Territory of Hawaii:

The above-named defendant, Hoffschlaeger Company, Limited, petitioner in the above-entitled cause deeming itself aggrieved by the decision and judgment in said cause affirming the judgment of the Circuit Court of the Fourth Judicial Circuit of

the Territory of Hawaii, which judgment of the Supreme Court of the Territory of Hawaii was rendered on the 27th day of October, A. D. 1922, and claiming that there are manifest errors to the damage of the petitioner in the same, which errors are specifically set forth in assignment of errors filed herewith, to which reference is hereby made, comes now by Smith, Warren, Stanley & Vitousek, its attorneys, and hereby respectfully prays that a writ of error be allowed to it in the above-entitled cause and that it be allowed to prosecute the same to the United States Circuit Court of Appeals for the Ninth Circuit under and according to the laws of the United States in that behalf made and provided; that an order be made fixing the amount of security the petitioner shall give [333] and furnish upon said writ of error, and that upon the giving of such security all proceedings relative to enforcement and execution of the judgment aforesaid, and all other proceedings whatsoever in said cause in said Supreme Court of the Territory of Hawaii and said circuit Court of the Fourth Judicial Circuit of the Territory of Hawaii, be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit, and that the Clerk of the Supreme Court of the Territory of Hawaii be directed to send to the United States Circuit Court for the Ninth Circuit a transcript of the record, proceedings, exhibits and papers in this cause, duly authenticated, for the correction of the errors so



complained of, and that a citation and supersedeas may issue.

And in this behalf the petitioner shows that the said judgment was rendered in an action at law, and that the amount involved in said action, exclusive of costs, exceeds the sum or value of Five Thousand Dollars.

Dated, Honolulu, T. H., this 13th day of December, 1922.

HOFFSCHLAEGER COMPANY, LIMITED,  
Petitioner,  
By SMITH, WARREN, STANLEY & VITOUSEK,  
Its Attorneys.

City and County of Honolulu,  
Territory of Hawaii,  
United States of America,—ss.

William L. Stanley, being first duly sworn, on oath deposes and says: That he is a member of the firm of Smith, Warren, Stanley & Vitousek, the attorneys of the above-named petitioner Hoffschlaeger Company, Limited; that he has read the foregoing petition and knows its contents and that the matters [334] and things therein set forth are true of his own knowledge, and further that the amount involved in the cause aforesaid, exclusive of costs, exceeds the sum or value of five thousand dollars.

W. L. STANLEY,

Subscribed and sworn to before me this 13th day of December, 1922.

[Seal]

J. A. THOMPSON,  
Clerk of the Supreme Court of the Territory of  
Hawaii.

The foregoing petition is granted, a writ of error allowed, and the bond on said writ of error is fixed at \$8,500.

Dated: December 13th, 1922.

[Seal]

E. C. PETERS,

Chief Justice.

Due service of the within petition has been made on Fred Patterson, by leaving with him a copy thereof at his usual place of business, to wit: at his office in the Bradshaw Building on Kinoole Street, District of South Hilo, County and Territory of Hawaii, this 18th day of December, A. D. 1922.

SAMUEL K. PUA,

Sheriff, County of Hawaii, T. H. [335]

[Endorsed]: No. 1360. In the Supreme Court, Territory of Hawaii. Margaret Fraga, by Alfred Fraga, Her Guardian *ad Litem*, Plaintiff-Defendant in Error, vs. Hoffschlaeger Company, Limited, Defendant-Plaintiff in Error. Petition for Writ of Error and Supersedeas. Filed December 13, 1922, at 10:37 A. M. and Issued for Service. J. A. Thompson, Clerk Supreme Court of Hawaii. Returned December 19, 1922, at 10:00 A. M. J. A. Thompson, Clerk Supreme Court of Hawaii.

Due service of and receipt of a copy of the within petition is hereby admitted this — day of December, 1922.

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Attorney for Margaret Fraga, Plaintiff-Defendant  
in Error. [336]

In the Supreme Court of the Territory of Hawaii.

No. 1360.

ON ERROR SUED OUT BY THE DEFENDANT.  
MARGARET FRAGA, by ALFRED FRAGA, Her  
Guardian ad Litem,

Plaintiff-Defendant in Error,

vs.

HOFFSCHLAEGER COMPANY, LIMITED,  
Defendant-Plaintiff in Error.

**Assignment of Errors.**

AND NOW comes the above-named Hoffschlaeger Company, Limited, the defendant-plaintiff in error in the above-entitled cause, and says there is manifest error in the record and proceedings in said cause in the Supreme Court of the Territory of Hawaii, in this, to wit:

1. That said Supreme Court erred in holding that there was no error in the record and proceedings of the Circuit Court of the Fourth Circuit of the Territory of Hawaii on the trial of the cause before a jury entitled "Margaret Fraga, by Alfred Fraga, Her Guardian *ad Litem*, Plaintiff, vs. Hoffschlaeger Company, Limited, Defendant," requiring a reversal of the judgment entered in that court on the 1st day of June, 1921.

2. That said Supreme Court erred in holding that the Trial Judge was not in error in overruling the suggestion of the disqualification [337] of the Honorable J. W. Thompson, Judge of the Cir-

cuit Court of the Third Circuit of the Territory of Hawaii to preside at the trial of the above cause, which was pending for trial before a jury in the Circuit Court of the Fourth Circuit of the said Territory, said suggestion of disqualification having been duly filed by the defendant-plaintiff in error herein on May 23d, 1921, prior to the empaneling of a jury in said cause.

3. That said Supreme Court erred in holding that the Trial Judge was not in error in denying the motion of the defendant-plaintiff in error duly filed in said cause on May 25th, 1921, for the withdrawal of a juror and the entry of a mistrial in said cause, by reason of the publication, after a jury had been empaneled and sworn and the taking of testimony had commenced, of a newspaper article stating that an insurance company was defending the said cause and other matters prejudicial to the defendant-plaintiff in error and calculated to prevent a fair trial of the said cause.

4. That said Supreme Court erred in holding that the Trial Judge was not in error in denying the motion made by the defendant-plaintiff in error during the cross-examination of one V. E. M. Osorio, a medical witness called for the plaintiff-defendant in error, that said witness be instructed to produce in court, for the purpose of further cross-examination of said witness in reference to his testimony as to their contents, certain medical books and works of authority mentioned and referred to by him, the said witness, in the course of said cross-examination, some of said books and works being at

the office of the witness and some at his house in Hilo, and the said witness having testified that the plaintiff-defendant in error was suffering from an injury to her left leg, below the [338] knee, known as a partial separation of the epiphysis of the tubercle of the tibia; that such condition might continue until she was between the ages of twenty and twenty-five, and that he could not state anything certain about a complete cure at that time, his testimony on cross-examination being as follows:

“Q. And it was an injury such as you claim the plates in this case of the girl’s left knee show that you were speaking of yesterday, when you said that such an injury heals from three to five weeks?

A. We expect it to heal.

Q. And it is agreed among medical men that it usually heals about that time?

A. It does not. Medical men do not claim that. We expect it to heal in three to five weeks, if it does heal.

Q. What do you mean, Doctor, by the expression you expect it to heal?

A. Well, we expect it to because we figure it to be about the same formation as bone; bone takes three to five weeks to heal, we give it the same time to heal.

Q. Have you any authority for that statement?

A. Sajous; Cunningham; Rose and Carton and De Costa.

Q. Have you any of those authorities here?



A. I have Sajous; De Costa, Cunningham, Rose and Carton.

Q. Will you produce those, Doctor?

A. I will have to go home and get them.

Judge STANLEY.—I ask that witness be instructed to go home and get them, your Honor.”

5. That said Supreme Court erred in holding that the Trial Judge was not in error in denying the motion made by the defendant-plaintiff in error during the cross-examination of the said witness V. E. M. Osorio that he be instructed to produce in court certain medical books and works of authority mentioned and referred to by him, the said witness, in the course of said cross-examination, for the purpose of enabling the defendant-plaintiff in error to cross-examine him in reference to the testimony given by him as to their contents, and to require the witness while under cross-examination to read or refer to the portions thereof cited by him as authorities for the opinion testified to by him that an injury known as a [339] partial separation of the epiphysis of the tubercle of the tibia does not usually heal until the tubercle becomes bone and is united to the shaft of the tibia, said union occurring between the ages of twenty and twenty-five.

6. That said Supreme Court erred in holding that the Trial Judge was not in error in denying the motion made by the defendant-plaintiff in error during the cross-examination of the said witness V. E. M. Osorio that he produce in court, for the pur-

pose of further cross-examination of said witness in reference to his testimony as to its contents, a certain surgical work known as De Costa's (a copy of which was at the witness' house in Hilo) mentioned by him on cross-examination as an authority for the opinion testified to by said witness that if an injury such as he testified was suffered by the plaintiff-defendant in error, namely, a partial separation of the epiphysis of the tubercle of the tibia, did not completely heal within three or four weeks, it would serve no purpose to keep the injured part immobile, that the patient might then be permitted to walk, and that by giving the injured part as much rest as possible recovery could not be expected more quickly than when the patient was permitted to walk; the Trial Judge denying the motion for the reason that he had allowed the witness to be examined and cross-examined on his ability as a surgeon.

7. That said Supreme Court erred in holding that the Trial Judge was not in error in refusing to permit the defendant-plaintiff in error during the cross-examination of the said witness V. E. M. Osorio, to put to him the following question:

“Q. You don't mean, Doctor, that she would get well quicker by being allowed to walk and move, and having some of the force felt on that muscle than she would if she had not been allowed to walk?” [340]

the said witness having testified previously that the muscle or set of muscles chiefly used in extending the leg—the quadriceps femoris uniting in the ten-

don patellae—is attached to that portion of the leg which was in the case of the plaintiff-defendant in error alleged to have been injured, namely, the tubercle of the tibia.

8. That said Supreme Court erred in holding that the Trial Judge was not in error in refusing to permit the defendant-plaintiff in error during the cross-examination of the said witness V. E. M. Osorio to put to him the following question:

“Q. And is it not a fact, Doctor, that every time that the plaintiff extended her leg the action of the quadriceps tendon tends to enlarge that separation and prevent—”

the said witness having testified that the tendon in said question referred to was attached to that part of the leg alleged in the case of the plaintiff-defendant in error to have been injured, and having further testified that the object a doctor has in view in treating such an injury is to prevent further separation of the tubercle and to allow the tubercle to get back to its normal position.

9. That said Supreme Court erred in holding that the Trial Judge was not in error in refusing to permit the defendant-plaintiff in error during the cross-examination of the said witness V. E. M. Osorio to put to him the following question:

“Q. I will ask you, Doctor, is it not a fact that if you want to guard against any further separation and allow the tubercle to resume its normal position and allow the patient to recover naturally, you must prevent in some

way all action of the muscles on the injured part?" [341]

10. That said Supreme Court erred in holding that the Trial Judge was not in error in refusing to permit the defendant-plaintiff in error during the cross-examination of the said witness V. E. M. Osorio to put to him the following question:

"Q. You stated, Doctor, I think, that the allowing of the plaintiff to walk about and extend her injured limb would not delay recovery because you expected by counter-irritation, some bone tissue; please explain what you meant."

the said witness having testified previously as follows:

"Q. Is it not a fact that every time she extended her leg that tendon was pulling on the injured part?

A. We expected that by due counter-irritation to have a certain amount of bone tissue to heal it. With that protection she had on, it prevented a complete usage of that muscle that controls that ligament."

11. That said Supreme Court erred in holding that the Trial Judge committed no error during the course of the cross-examination of the said witness V. E. M. Osorio in putting to the said witness and allowing him to answer in the affirmative the following question:

"Q. (By Judge THOMPSON.) Doctor, did you give this girl such treatment as your exper-

ience, your ability, and medical science would dictate, under the circumstances?"

the Trial Judge having immediately prior instructed the witness that he need not answer the following question put to him by the defendant-plaintiff in error:

"Q. Is it not a fact, Doctor, that an injured leg was during the time of your service in the Expeditionary Forces kept in a sling or hammock so that the muscle affecting the injured part would not play upon it?"

the said witness having testified on direct examination that he had served as a surgeon with the United States Expeditionary Force in Europe and had there had considerable experience with fractures, and [342] the defendant-plaintiff in error having excepted to the question put as above by the Trial Judge on the ground that it did not call for the standard of treatment which the law requires.

12. That said Supreme Court erred in holding that the Trial Judge was not in error in refusing to allow the said witness V. E. M. Osorio, during his recross-examination by and at the request of the defendant-plaintiff in error, to examine a medical work known as "Keene's Surgery," which was present in court and which during his redirect examination had been exhibited to the said witness by the plaintiff-defendant in error, identified by the said witness and mentioned by him as an authority during said redirect examination, for the proposition that if an injury such as the plaintiff-defendant in error was alleged to have suffered did not



heal within three or four weeks a recovery could not be expected for some years, and to point out the passage in said medical work to which he, said witness, had reference; and also in refusing to permit the said witness to answer the following question:

“Q. You have cited Keene’s work on Surgery as being an authority for the proposition that if the healing of an injury such as you as plaintiff suffered on August 20th was not effected within three or four weeks it would not heal for years; will you please turn to the passage in Keene to which you have reference?”

the purpose of the proposed cross-examination being to lay the foundation for contradicting and impeaching the testimony of the said witness:

13. That said Supreme Court erred in holding that the Trial Judge was not in error in denying the motion made by the defendant-plaintiff in error at the conclusion of the recross-examination of the said witness V. E. M. Osorio to strike out all the evidence given by the said witness to the effect that the authorities named by him supported the opinions to which he had testified, on the ground that [343] the defendant-plaintiff in error had not been allowed to cross-examine the witness in regard to said authorities and that the Court had refused to order the production of the books and authorities referred to by the said witness so that the defendant-plaintiff in error might be enabled to cross-examine the said witness in reference to his testimony as to their contents.

14. That the said Supreme Court erred in holding that the Trial Judge was not in error in denying the motion made by the defendant-plaintiff in error at the close of the plaintiff-defendant in error's case that a nonsuit be granted upon the ground that the evidence affirmatively showed such contributory negligence on the part of the plaintiff-defendant in error as to preclude any recovery by her.

15. That said Supreme Court erred in holding that the Trial Judge was not in error in giving to the jury over the objection of the defendant-plaintiff in error the following instruction requested by the plaintiff-defendant in error:

“You are also charged that it is not the law that a person passing along the sidewalk in a city who has no knowledge of any defects therein, is required to be constantly watching for holes in or for obstructions upon, the walk, but he has the right to assume that the walk is in a reasonably safe condition and to act upon that assumption.”

16. That said Supreme Court erred in holding that the Trial Judge was not in error in giving to the jury over the objection of the defendant-plaintiff in error the following instruction requested by the plaintiff-defendant in error:

“You are instructed that in the use of the elevator shaft in question the defendant was bound under the law to the exercise of reasonable care and diligence for the safety of such persons as had occasion [344] to use the

sidewalk over said shaft, and it is for you to determine whether in this case the defendant used due diligence to protect the traveling public against falling into this open shaft. And upon the question as to whether defendant exercised reasonable care and prudence in this respect, you may consider the location of this shaft, whether the defendant could expect persons using the sidewalk while the shaft was open, whether or not defendant should have guarded or protected the opening so that persons passing along would not be likely to fall into it, and if so, whether defendant did so guard and protect said opening, and you may consider such other circumstances to be found in the evidence as will have a direct bearing upon this question.”

17. That said Supreme Court erred in holding that the Trial Judge was not in error in giving to the jury over the objection of the defendant-plaintiff in error the following instruction requested by the plaintiff-defendant in error:

“You are instructed that while the plaintiff was bound to use care for her own safety in walking along the sidewalk, the care required of her was not the highest degree of care or prudence, nor was it that degree of care that an unusually cautious man or a man of extraordinary prudence would have exercised, but the degree of care expected of the plaintiff was that which an ordinarily prudent person would have exercised under similar circumstances.

And in this connection you are charged that the fact merely that plaintiff's attention was diverted at the time of the injury does not establish contributory negligence as a matter of law."

18. That said Supreme Court erred in holding that the Trial Judge was not in error in giving to the jury over the objection of the defendant-plaintiff in error the following instruction requested by the plaintiff-defendant in error:

"Upon the question as to whether or not the plaintiff was guilty of contributory negligence in failing to observe the opening into which she fell, you may consider the location of this shaft, the extent to which it covered the sidewalk, whether or not the sidewalk was on a business street, whether or not she acted reasonably in diverting her attention, if her attention was diverted, her age, and such other facts to be found in the evidence bearing upon [345] this issue, and all in the light of the fact that she had a right to assume that the sidewalk was in a reasonably safe condition."

19. That said Supreme Court erred in holding that the Trial Judge was not in error in giving to the jury over the objection of the defendant-plaintiff in error the following instruction requested by the plaintiff-defendant in error:

"You are further instructed that the mere fact that plaintiff knew of the existence of this elevator shaft and failed to avoid it or failed to look for it in passing to determine whether

or not it was open at the time does not render her guilty of contributory negligence as a matter of law and will not as a matter of law preclude her from recovering."

20. That said Supreme Court erred in holding that the Trial Judge was not in error in giving to the jury over the objection of the defendant-plaintiff in error the following instruction requested by the plaintiff-defendant in error:

"The Court further instructs the jury that she (the plaintiff) sued for pain and suffering, which she claims to have sustained. Now, that comes under the general head of pain and suffering. There is no mathematical measure given by law for this. You will ascertain from the evidence, if defendant is liable, how much pain and suffering, mentally and bodily has been undergone by plaintiff, and how much she will undergo, if the evidence discloses it. Then you will find for her what you, as impartial jurors, would find from the evidence to be fairly compensatory to her, but in no event in a sum in excess of the amount of \$11,500."

21. That said Supreme Court erred in holding that the Trial Judge was not in error in denying the motion made by the plaintiff-defendant in error, duly filed on the 6th day of June, 1921, to vacate and set aside the verdict of the jury awarding to the plaintiff-defendant in error against the defendant-plaintiff in error damages in the sum of \$7,250; to vacate and set aside the judgment rendered [346] on said verdict on the 1st day of



June, 1921, and to grant a new trial in said cause.

22. That said Supreme Court erred in holding that the Trial Judge was not in error in denying the motion made and filed by the defendant-plaintiff in error on the 6th day of June, 1921, to vacate and set aside the verdict of the jury and the judgment rendered thereon, for the reason that the defendant-plaintiff in error was during the trial of said cause unduly and improperly restricted in its right of cross-examination of the witnesses called on behalf of the plaintiff-defendant in error.

23. That said Supreme Court erred in holding that the Trial Judge was not in error in denying the motion made and filed by the defendant-plaintiff in error on the 6th day of June, 1921, to vacate and set aside the verdict of the jury and the judgment rendered thereon, for the reason that the evidence showed that the proximate cause of the injury to the plaintiff was her own negligence and further showed her to be guilty of negligence which not only contributed to the accident but without which the same could not have occurred.

24. That said Supreme Court erred in holding that the Trial Judge was not in error in denying the motion made and duly filed by the defendant-plaintiff in error on the 6th day of June, 1921, to vacate and set aside the verdict of the jury and the judgment rendered thereon, for the reason that the damages awarded to the plaintiff-defendant in error were excessive.

25. That said Supreme Court erred in affirming the judgment of the Circuit Court of the Fourth

Circuit of the Territory of Hawaii made and entered on the 1st day of June, 1921, wherein and whereby it was adjudged that the plaintiff-defendant in error should [347] have and recover from the defendant-plaintiff in error the sum of \$7,250, damages, and costs taxed in the sum of \$26.75.

26. That said Supreme Court erred in not vacating and setting aside the judgment of the Circuit Court of the fourth Circuit of the Territory of Hawaii, made and entered on the 1st day of June, 1921, and in refusing to order a new trial of the said cause.

WHEREFORE, said Hoffschlaeger Company, Limited, defendant-plaintiff in error, prays that the judgment of the Supreme Court of the Territory of Hawaii be reversed, and that said Court be ordered to enter a judgment vacating and setting aside the judgment of the Circuit Court of the Fourth Circuit of the Territory of Hawaii, and ordering a new trial of said cause in said Circuit Court.

Dated, Honolulu, T. H., the 13th day of December, 1922.

SMITH, WARREN, STANLEY & VITOUSEK  
Attorneys for Hoffschlaeger Company, Limited,  
Plaintiff in Error.

Due service of the within Assignment of Errors has been made on Fred Patterson, by leaving with him a copy thereof at his usual place of business, to wit: at his office in the Bradshaw Building on Kinoole Street, District of South Hilo, County and

Territory of Hawaii, this 18th day of December  
A. D. 1922.

SAMUEL K. PUA,  
Sheriff, County of Hawaii, T. H. [348]

[Endorsed]: No. 1360. In the Supreme Court of  
the Territory of Hawaii. Margaret Fraga, by  
Alfred Fraga, her Guardian *ad Litem*, Plaintiff-  
Defendant in Error, vs. Hoffschlaeger Company,  
Limited, Defendant-Plaintiff in Error. Assign-  
ment of Errors. Dated December 13th, 1922. Filed  
December 12, 1922, at 10:37 A. M. and Issued for  
Service. J. A. Thompson, Clerk Supreme Court of  
Hawaii. Returned December 19th, 1922, at 10:00  
A. M. J. A. Thompson, Clerk, Supreme Court of  
Hawaii.

Due service of and receipt of a copy of the within  
assignment of errors is hereby admitted this ——  
day of December, 1922.

\_\_\_\_\_,  
Attorney for Margaret Fraga, Plaintiff-Defendant  
in Error. [349]

In the Supreme Court of the Territory of Hawaii.  
October Term—1922.

No. 1360.

MARGARET FRAGA, by ALFRED FRAGA,  
Her Guardian ad Litem,  
Plaintiff-Defendant in Error,  
vs.

HOFFSCHLAEGER COMPANY, LIMITED,  
Defendant-Plaintiff in Error.

**Writ of Error.**

United States of America,—ss.

The President of the United States of America  
to the Honorable Justices of the Supreme  
Court of the Territory of Hawaii, GREET-  
ING:

Because in the record and proceedings, as also in the rendition of judgment in said Supreme Court of the Territory of Hawaii before you, in the case of Margaret Fraga, by Alfred Fraga, Her Guardian *ad Litem*, Plaintiff-Defendant in Error, vs. Hoffschlaeger Company, Limited, Defendant-Plaintiff in Error, manifest errors have happened to the great prejudice and damage of said Hoffschlaeger Company, Limited, defendant-plaintiff in error, as appears by the petition herein,

We, being willing that errors, if any have been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that

then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all [350] things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the said record and proceedings aforesaid at the City of San Francisco, State of California, and filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit thirty days after the date hereof, to the end that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct those errors what of right, and according to the laws and customs of the United States, should be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States, this 13th day of December, A. D. 1922.

ATTEST my hand and the seal of the Supreme Court of the Territory of Hawaii, at the Clerk's office, Honolulu, Territory of Hawaii, on the day and year last above written.

J. A. THOMPSON.

Clerk of the Supreme Court, Territory of Hawaii.

Allowed this 13th day of December, A. D. 1922.

[Seal]

E. C. PETERO,

Chief Justice of the Supreme Court, Territory of Hawaii.

Due service of the within Writ of Error has been made on Fred Patterson, by leaving with him a copy thereof at his usual place of business, to wit:



at his office in the Bradshaw Building on Kinoole Street, District of South Hilo, County and Territory of Hawaii, this 18th day of December A. D. 1922.

SAMUEL K. PUA,

Sheriff, County of Hawaii, T. H. [351]

[Endorsed]: No. 1360. In the Supreme Court of the Territory of Hawaii. Margaret Fraga, by Alfred Fraga, Her Guardian *ad Litem*, Plaintiff-Defendant in Error, vs. Hoffschlaeger Company, Limited, Defendant-Plaintiff in Error. Writ of Error. Filed December 13, 1922, at 10:37 A. M. and Issued for Service. J. H. Thompson, Clerk Supreme Court of Hawaii. Returned December 19, 1922, at 10:00 A. M. J. A. Thompson, Clerk Supreme Court of Hawaii.

Due service of and receipt of a copy of the within writ of error is hereby admitted this — day of December, 1922.

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Attorney for Margaret Fraga, Plaintiff-Defendant in Error. [352]

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In the Supreme Court of the Territory of Hawaii.  
October Term—1922.

No. 1360.

MARGARET FRAGA, by ALFRED FRAGA, Her  
Guardian *ad Litem*,

Plaintiff-Defendant in Error,

vs.

HOFFSCHLAEGER COMPANY, LIMITED,  
Defendant-Plaintiff in Error.

**Citation on Writ of Error.**

United States of America,—ss.

The President of the United States of America to  
Margaret Fraga, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, State of California, within thirty days from the date of this writ, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the Territory of Hawaii, wherein Hoffschlaeger Company, Limited, is plaintiff in error, and you are defendant in error, and show cause, if any there may be, why the judgment rendered against the said defendant-plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States, this 13th day of December, A. D. 1922.

[Seal]

E. C. PETERS,  
Chief Justice of the Supreme Court, Territory of  
Hawaii.

Due service of the within citation on writ of error has been made on Fred Patterson, by leaving with him a copy thereof at his usual place of business, to wit, at his office in the Bradshaw Building on Kinoole Street, District of South Hilo, County

and Territory of Hawaii, this 18th day of December A. D. 1922.

SAMUEL K. PUA,  
Sheriff, County of Hawaii, T. H. [353]

[Endorsed]: No. 1360. In the Supreme Court of the Territory of Hawaii. Margaret Fraga, by Alfred Fraga, Her Guardian *ad Litem*, Plaintiff-Defendant in Error, vs. Hoffschlaeger Company, Limited, Defendant-Plaintiff in Error. Citation on Writ of Error. Filed December 13, 1922, at 10:37 A. M. and Issued for Service. J. A. Thompson, Clerk Supreme Court of Hawaii. Returned December 19, 1922, at 10:00 A. M. J. A. Thompson, Clerk Supreme Court of Hawaii.

Due service of and receipt of a copy of the within citation is hereby admitted this —— day of December, A. D. 1922.

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Attorney for Margaret Fraga, Plaintiff-Defendant  
in Error. [354]

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In the Supreme Court of the Territory of Hawaii.  
October Term—1922.

MARGARET FRAGA, by ALFRED FRAGA, Her  
Guardian *ad Litem*,  
Plaintiff-Defendant in Error,  
vs.

HOFFSCHLAEGER COMPANY, LIMITED,  
Defendant-Plaintiff in Error.

**Bond on Writ of Error.**

KNOW ALL MEN BY THESE PRESENTS: That we, Hoffschlaeger Company, Limited, a Hawaiian corporation, as principal, and Hartford Accident & Indemnity Company, a corporation duly organized under the laws of the State of Connecticut (authorized to do a surety business in the Territory of Hawaii, and having its Honolulu office with American Factors, Limited, in Honolulu, in said Territory), as surety, are held and firmly bound unto Margaret Fraga in the penal sum of Eighty-five Hundred Dollars (\$8500), for the payment of which, well and truly to be made to said Margaret Fraga, do hereby bind ourselves and our respective successors, jointly and severally, firmly by these presents.

THE CONDITION of the above obligation is such that whereas on the 13th day of December, 1922, the above-bounden principal sued out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, from that certain judgment made and entered in the above-entitled court and cause on the 27th day of October, 1922, by the Supreme Court of the Territory of Hawaii:

NOW, THEREFORE, if the said principal shall prosecute [355] its said writ of error to effect and answer all damages and costs if it fails to sustain its writ of error, then this obligation shall be void; otherwise it shall remain in full force, virtue and effect.

IN WITNESS WHEREOF the said principal and surety herein named have caused this instrument to be duly executed in their corporate names and behalf on this 13th day of December, A. D. 1922.

HOFFSCHLAEGER COMPANY, LIMITED,

By ROBT. F. LANGE,

Its Pres. [Seal]

By HANS M. GITTEL,

Its Secty. & Treasurer.

HARTFORD ACCIDENT & INDEMNITY COMPANY.

By JAS. M. MacCONEL,

Attorney in Fact.

By Attest: E. HUTTON SMITH,

Attorney in Fact. (Seal)

The foregoing bond is approved, and it is ordered that same shall operate and take effect as a supersedeas.

[Seal]

E. C. PETERS,

Chief Justice of the Supreme Court, Territory of Hawaii.

Dated: Honolulu, T. H., December 18, 1922.

Due service of the within bond on writ of error has been made on Fred Patterson, by leaving with him a copy thereof at his usual place of business, to wit: at his office in the Bradshaw Building on Kinooole Street, District of South Hilo, County and Territory of Hawaii, this 21st day of December, A. D. 1922.

SAMUEL K. PUA,

Sheriff, County of Hawaii, T. H. [356]



[Endorsed]: No. 1360. In the Supreme Court of the Territory of Hawaii. Margaret Fraga, by Alfred Fraga, Her Guardian *ad Litem*, Plaintiff-Defendant in Error, vs. Hoffschlaeger Company, Limited, Defendant-Plaintiff in Error. Bond on Writ of Error. Filed December 18, 1922, at 9:58 A. M. J. A. Thompson, Clerk Supreme Court of Hawaii. Returned December 23, 1922, at 9 A. M. J. A. Thompson, Clerk Supreme Court of Hawaii.

Due service of and receipt of a copy of the within bond is hereby admitted — day of December, 1922.

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Attorney for Margaret Fraga, Plaintiff-Defendant in Error. [357]

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In the Supreme Court of the Territory of Hawaii.  
No. 1360.

ON ERROR SUED OUT BY THE DEFENDANT.

MARGARET FRAGA, by ALFRED FRAGA, Her  
Guardian *ad Litem*,

Plaintiff-Defendant in Error,

vs.

HOFFSCHLAEGER COMPANY, LIMITED,

Defendant-Plaintiff in Error.

**Order Extending Time to and Including February  
20, 1923, to File Record and Docket Cause.**

Upon the application of the plaintiff in error and good cause appearing therefor, and pursuant

to Section 1 of Rule 16 of the United States Circuit Court of Appeals for the Ninth Circuit,—

IT IS HEREBY ORDERED that the plaintiff in error, Hoffschlaeger Company, Limited, and the Clerk of this Court, be and they hereby are allowed until and including the 20th day of February, 1923, within which time to prepare and transmit to the Clerk of the Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, the record in the above-entitled cause on assignment of errors in this Court, together with said assignment of errors and all other papers required as part of said record.

Dated, Honolulu, T. H., December 19th, 1922.

[Seal]

E. C. PETERS,

Chief Justice of the Supreme Court of the Territory of Hawaii.

This order is consented to, December —, 1922.

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Attorney for Defendant in Error. [358]

Due service of the within order extending time for preparation and transmission of record has been made on Fred Patterson, by leaving with him a copy thereof at his usual place of business, to wit: at his office in the Bradshaw Building on Kinoole Street, District of South Hilo, County and Territory of Hawaii, this 21st day of December, A. D. 1922.

SAMUEL K. PUA,  
Sheriff, County of Hawaii.

Service of the within order is hereby admitted  
this —— day of December, 1922.

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[Endorsed]: No. 1360. In the Supreme Court of  
the Territory of Hawaii. Margaret Fraga, by Al-  
fred Fraga, Her Guardian *ad Litem*, Plaintiff-De-  
fendant in Error, vs. Hoffschlaeger Company,  
Limited, Defendant-Plaintiff in Error. Order Ex-  
tending Time for Preparation and Transmission of  
Record. Filed December 19, 1922, at 3:58 P. M.  
J. A. Thompson, Clerk Supreme Court of Hawaii.  
Returned December 23, 1922, at 9:00 A. M. J. A.  
Thompson, Clerk Supreme Court of Hawaii. [359]

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In the Supreme Court of the Territory of Hawaii.  
No. 1360.

ON ERROR SUED OUT BY THE DEFENDANT.

MARGARET FRAGA, by ALFRED FRAGA, Her  
Guardian *ad Litem*,

Plaintiff-Defendant in Error,

vs.

HOFFSCHLAEGER COMPANY, LIMITED,

Defendant-Plaintiff in Error.

**Praeipce for Transcript of Record on Writ of Error.**

To James A. Thompson, Esq., Clerk of the Su-  
preme Court, Territory of Hawaii:

You will please prepare a transcript of the rec-  
ord in the above-entitled cause, to be filed in the  
office of the Clerk of the United States Circuit

Court of Appeals for the Ninth Circuit, and include in said transcript the following pleadings, opinions, judgments and papers on file in said cause, to wit:

1. Copy of application for writ of error to Fourth Circuit Court, Territory of Hawaii, filed November 23, 1921.
2. Copy of assignment of errors, filed November 23, 1921.
3. Copy of bond on writ of error, filed November 23, 1921.
4. Copy of praecipe on writ of error, filed November 23, 1921.
5. Copy of acknowledgment of service of notice of application and copy of assignment of errors, filed November 29, 1921.
6. Copy of writ of error.
7. Copy of complaint, filed December 3, 1920.  
[360]
8. Copy of term summons with return of service.
9. Copy of answer of defendant filed January 13, 1920.
10. Copy of suggestion of disqualification filed May 23, 1921.
11. Copy of commission dated March 4, 1921, signed by Chief Justice Jas. L. Coke authorizing Hon. J. Wesley Thompson to preside at the trial of any cause or causes in the Fourth Circuit Court.
12. Decision and ruling on suggestion of disqualification filed May 24, 1921,—Copy of.
13. Copy of motion of defendant for withdrawal of juror and entry of mistrial filed May 25,

- 1921, with exhibit "A" and affidavit of W. L. Stanley attached thereto, filed May 25, 1921.
14. Affidavit of J. W. Russell and Harold Russell, filed May 25, 1921,—Copy of.
15. Copy of counter-affidavits of W. L. Stanley, Karl J. Meinke, filed May 26, 1921.
16. Copy of decision of Judge Thompson on motion for withdrawal of juror and entry of mistrial, filed May 27, 1921.
17. Copy of verdict of jury, filed May 27, 1921.
18. Copy of judgment, filed June 1, 1921.
- Interlineation 19. Copy of motion for new trial with  
1/5/23 Exhibits "A," "B," "C," "D,"  
J. A. T., Clerk "D-1" and "E" attached thereto.  
By permission  
of Chief  
Justice 20. Copy of affidavits of Harold Russell,  
Eugene Banks and Frank J. Cody,  
filed September 27, 1921.
21. Copy of ruling (Hon. H. L. Ross) on motion for new trial, filed November 12, 1921.
22. Copy of order overruling motion for new trial, filed November 19, 1921.
23. Copy of exception to ruling denying motion for new trial, filed November 18, 1921.
24. Copy of plaintiff's requested instructions.
25. Copy of defendant's requested instructions.
26. Copy of clerk's minutes Circuit Court, J. W. Thompson, May 23, 24, 25, 26 and 27, 1921.
27. Copy of transcript of stenographer's notes of evidence adduced at the trial of said cause.  
[361]
28. Copy of bond on motion for new trial filed June 6, 1921.



29. Copy of decision of Supreme Court filed September 13, 1922.
30. Copy of judgment of Supreme Court filed October 27, 1922.
31. Copy of notice of judgment filed October 27, 1922.
32. Copy of petition for writ of error.
33. Copy of assignment of errors.
34. Copy of citation on writ of error and return of service.
35. Copy of bond on writ of error.
36. Copy of order extending time for preparation and transmission of record.

And, in addition, you will please transmit with the foregoing all of the following exhibits:

Plaintiff's Exhibit "A," Lease from Bank of Hilo, Ltd., to Hoffschlaeger Company, Limited, dated October 21, 1918.

Plaintiff's Exhibit "B," X-ray Photographic Plate.  
Plaintiff's Exhibit "C," Photographic Print of X-ray Plate Ex. "B."

Plaintiff's Exhibit "D," X-ray Photographic Plate  
Plaintiff's Exhibit "E," X-ray Photographic Plate.  
Plaintiff's Exhibit "F," Photographic Print of X-ray Plate Ex. "D."

Plaintiff's Exhibit "G," Photographic Print of X-ray Plate Ex. "E."

Plaintiff's Exhibit "H," Photograph of Iron Grating.

Plaintiff's Exhibit "I," Photographic Print of X-ray No. 1014.

Plaintiff's Exhibit "J," Photographic Print of  
X-ray No. 1015.

Plaintiff's Exhibit "K," X-ray Photographic Plates  
No. 1014 and No. 1015.

Plaintiff's Exhibit "L," Photographic Print of  
X-ray Plate No. 1016.

Plaintiff's Exhibit "M," Photographic Print of  
X-ray Plate No. 1017.

Plaintiff's Exhibit "N," X-ray Photographic Plates  
No. 1016 and No. 1017. [362]

You will also annex to and transmit with the record the original writ of error from the United States Circuit Court of Appeals for the Ninth Circuit, and original citation with return of service, your return to the writ of error under the Seal of the Supreme Court of the Territory of Hawaii, and also your Certificate stating in detail the cost of the record and by whom the same was paid.

Dated, Honolulu, T. H., December 13th, 1922.  
SMITH, WARREN, STANLEY & VITOUSEK,  
Attorneys for Plaintiff in Error.

Due service of the within Praecept for Transcript of Record on Writ of Error has been made on Fred Patterson, by leaving with him a copy thereof at his usual place of business, to wit: at his office in the Bradshaw Building on Kinoole Street, District of South Hilo, County and Territory of Hawaii, this 18th day of December A. D. 1922.

SAMUEL K. PUA,  
Sheriff, County of Hawaii, T. H. [363]

[Endorsed]: No. 1360. In the Supreme Court of the Territory of Hawaii. Margaret Fraga, by Al-

fred Fraga, Her Guardian *ad Litem*, Plaintiff-Defendant in Error, vs. Hoffschlaeger Company, Limited, Defendant-Plaintiff in Error. Praecipe for Transcript of Record on Writ of Error. Dated December 13th, 1922. Filed December 13, 1922, at 10:37 A. M. and Issued for Service. J. A. Thompson, Clerk Supreme Court of Hawaii. Returned December 19, 1922, at 10:00 A. M. J. A. Thompson, Clerk Supreme Court of Hawaii.

Due service of and receipt of a copy of the within praecipe is hereby admitted this —— day of December, 1922.

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Attorney for Margaret Fraga, Plaintiff-Defendant  
in Error. [364]

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In the Supreme Court of the Territory of Hawaii.

No. 1360.

ON ERROR SUED OUT BY THE DEFENDANT.

MARGARET FRAGA, By ALFRED FRAGA, Her  
Guardian Ad Litem,

Plaintiff-Defendant in Error,

vs.

HOFFSCHLAEGER COMPANY, LIMITED,

Defendant-Plaintiff in Error.

**Order for Transmission of Original Exhibits.**

To James A. Thompson, Esq., Clerk of the Supreme  
Court of the Territory of Hawaii:

You are hereby authorized and directed, in con-

nection with the writ of error from the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to transmit as part of the record required by the praecipe of the plaintiff in error the following exhibits, upon its counsel undertaking to return them to the files of this Court, namely:

1. Plaintiff's Exhibit "B," X-ray Photographic Plate.
2. Plaintiff's Exhibit "C," Photographic X-ray Print of Plate Ex. "B."
3. Plaintiff's Exhibit "D," X-ray Photographic Plate.
4. Plaintiff's Exhibit "E," X-ray Photographic Plate.
5. Plaintiff's Exhibit "F," Photographic Print of X-ray Plate, Ex. "D."
6. Plaintiff's Exhibit "G," Photographic Print of X-ray Plate, Ex. "E." [365]
7. Plaintiff's Exhibit "H," Photograph of Iron Grating.
8. Plaintiff's Exhibit "I," Photographic Print of X-ray No. 1014.
9. Plaintiff's Exhibit "J," Photographic Print of X-ray No. 1015.
10. Plaintiff's Exhibit "K," X-ray Photographic Plates No. 1014 and No. 1015.
11. Plaintiff's Exhibit "L," Photographic Print of X-ray Plate No. 1016.
12. Plaintiff's Exhibit "M," Photographic Print of X-ray Plate No. 1017.

Dated, Honolulu, T. H., this 13th day of December, 1922.

[Seal]

E. C. PETERS,

Chief Justice of the Supreme Court of the Territory of Hawaii.

Due service of the within Order for Transmission of Original Exhibits has been made on Fred Patterson, by leaving with him a copy thereof at his usual place of business, to wit: at his office in the Bradshaw Building on Kinoole Street, District of South Hilo, County and Territory of Hawaii, this 18th day of December A. D. 1922.

SAMUEL K. PUA,

Sheriff, County of Hawaii, T. H. [366]

[Endorsed]: No. 1360. In the Supreme Court of the Territory of Hawaii. Margaret Fraga, By Alfred Fraga, Her Guardian *Ad Litem*, Plaintiff-Defendant in Error, vs. Hoffschlaeger Company, Limited, Defendant-Plaintiff in Error. Order for Transmission of Original Exhibits. Dated December 13th, 1922. Filed December 13, 1922, at 10:37 A. M. and Issued for Service. J. A. Thompson, Clerk Supreme Court of Hawaii. Returned December 19, 1922, at 10:00 A. M. J. A. Thompson, Clerk Supreme Court of Hawaii.

Due service of and receipt of a copy of the within Order is hereby admitted this — day of December, 1922.

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Attorney for Margaret Fraga, Plaintiff-Defendant in Error. [367]



In the Supreme Court of the Territory of Hawaii.

No. 1360.

ON ERROR SUED OUT BY THE DEFENDANT.

MARGARET FRAGA, by ALFRED FRAGA, Her  
Guardian Ad Litem,

Plaintiff-Defendant 'in Error,

vs.

HOFFSCHLAEGER COMPANY, LIMITED,  
Defendant-Plaintiff in Error.

**Undertaking to Return Original Exhibits.**

To James A. Thompson, Esq., Clerk of the Supreme  
Court of the Territory of Hawaii:

We hereby undertake to return to the files of  
the Supreme Court of the Territory of Hawaii the  
following original exhibits sent to the United States  
Circuit Court of Appeals for the Ninth Circuit, in  
accordance with the order of the Chief Justice of  
the Supreme Court of the Territory of Hawaii:

1. Plaintiff's Exhibit "B," X-ray Photographic  
Plate.
2. Plaintiff's Exhibit "C," Photographic Print  
of X-ray Plate Ex. "B."
3. Plaintiff's Exhibit "D," X-ray Photographic  
Plate.
4. Plaintiff's Exhibit "E," X-ray Photographic  
Plate.
5. Plaintiff's Exhibit "F," Photographic Print of  
X-ray Plate Ex. "D."

6. Plaintiff's Exhibit "G," Photographic Print of X-ray Plate Ex. "E."
7. Plaintiff's Exhibit "H," Photograph of Iron Grating.
8. Plaintiff's Exhibit "I," Photographic Print of X-ray No. 1014.
9. Plaintiff's Exhibit "J," Photographic Print of X-ray No. 1015.
10. Plaintiff's Exhibit "K," X-ray Photographic Plates No. 1014 and No. 1015. [368]
11. Plaintiff's Exhibit "L," Photographic Print of X-ray Plate No. 1016.
12. Plaintiff's Exhibit "M," Photographic Print of X-ray Plate No. 1017.

Dated, Honolulu, T. H., December 13th, 1922.

SMITH, WARREN, STANLEY & VITOUSEK.

Due service of the within undertaking for return of original exhibits has been made on Fred Patterson, by leaving with him a copy thereof at his usual place of business, to wit: at his office in the Bradshaw Building on Kinoole Street, District of South Hilo, County and Territory of Hawaii, this 18th day of December A. D. 1922.

SAMUEL K. PUA,

Sheriff, County of Hawaii, T. H. [369]

[Endorsed]: No. 1360. In the Supreme Court of the Territory of Hawaii. Margaret Fraga, by Alfred Fraga, Her Guardian *ad Litem*, Plaintiff-Defendant in Error, vs. Hoffschlaeger Company, Limited, Defendant-Plaintiff in Error. Undertaking to Return Original Exhibits. Dated December 13th, 1922. Filed December 13, 1922, at 10:37 A. M.

and Issued for Service. J. A. Thompson, Clerk Supreme Court of Hawaii. Returned December 19, 1922, at 10:00 A. M. J. A. Thompson, Clerk Supreme Court of Hawaii.

Due service of and receipt of a copy of the within undertaking to return original exhibits is hereby admitted this — day of December, 1922.

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Attorney for Margaret Fraga, Plaintiff-Defendant  
in Error. [370]

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In the Supreme Court of the Territory of Hawaii.

No. 1360.

ON ERROR SUED OUT BY THE DEFEND-  
ANT.

MARGARET FRAGA, by ALFRED FRAGA,  
Her Guardian ad Litem,  
Plaintiff-Defendant in Error,  
vs.

HOFFSCHLAEGER COMPANY, LIMITED,  
Defendant-Plaintiff in Error.

**Order Extending Time to and Including April 5,  
1923, to File Record and Docket Cause.**

Upon the application of the plaintiff in error and good cause appearing therefor, and pursuant to Section 1 of Rule 16 of the United States Circuit Court of Appeals for the Ninth Circuit,—

IT IS HEREBY ORDERED that the plaintiff in error, Hoffschlaeger Company, Limited, and the Clerk of this Court, be and they are hereby allowed

until and including the 5th day of April, 1923, within which time to prepare and transmit to the Clerk of the Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, the record in the above-entitled cause on assignment of errors in this Court, together with said assignment of errors and all other papers required as part of said record.

Dated: Honolulu, T. H., February 9th, 1923.

[Seal]

E. C. PETERS,

Chief Justice of the Supreme Court of the Territory of Hawaii. [371]

[Endorsed]: No. 1360. In the Supreme Court of the Territory of Hawaii. Margaret Fraga, by Alfred Fraga, Her Guardian *ad Litem*, Plaintiff-Defendant in Error, vs. Hoffschlaeger Company, Limited, Defendant-Plaintiff in Error. Order extending Time for Preparation and Transmission of Record. Filed February 9, 1923, at 10:22 A. M. J. A. Thompson, Clerk Supreme Court of Hawaii.

Copy received this 9th day of February, 1923.

FRED PATTERSON,

Atty. for Defendant in Error. [372]

### **Plaintiff's Exhibit "A."**

Law No. 791. Received in Evidence May 24, 1921, and marked Plff's Exhibit "A." Thomas Pedro, Jr., Asst. Clerk.

### **LEASE.**

THIS INDENTURE OF LEASE made and executed upon this 21st day of October, A. D. 1918,

by and between the FIRST BANK OF HILO, LTD., a corporation organized and existing under and by virtue of the laws of the Territory of Hawaii, hereinafter called the Lessor, party of the first part, and the HOFFSCHLAEGER CO., LTD., also an Hawaiian corporation, hereinafter called the Lessee, party of the second part,

WITNESSETH:

That the Lessor for and in consideration of the rent reserved, has leased and does hereby lease, let and demise unto the Lessee, all of that portion of the Bank Building which is situate on the North East corner of Waianuenue and Keawe Streets, in the City of Hilo, County and Territory of Hawaii, which portion demised is described as being the two rooms used as stores fronting on Keawe Street, and which are the most Northern rooms of the said Bank Building; together with the basement under each of the two store rooms, and hydraulic elevator and the privileges and appurtenances.

TO HAVE AND TO HOLD the said premises from and after the 1st day of November, A. D. 1918, until the 1st day of April, A. D. 1927.

The said Lessee yielding and paying therefor as rental, monthly during the whole term, the sum of \$100.00, the said amount being payable to the Lessor at its banking house in Hilo, promptly upon the first day of each and every month without demand. [373]

And the Lessor hereby covenants and agrees to and with the Lessee and its permitted assigns that upon the payment of the rent reserved and the ob-



servance of all of the terms, covenants and conditions herein contained, the Lessee may have, use and enjoy said premises during the term hereof without the let or hindrance of any person whomsoever.

And the said Lessee for itself and its permitted assigns hereby covenants and agrees to and with the Lessor that during the term it will pay the said rent reserved at the times and at the place herein before specified without deduction of any kind; that it will neither suffer nor commit any strip or waste of the premises; that it will keep the same in the condition they now are at their own expense; loss or damage by fire or the elements alone excepted, and that they will not assign this lease or sublet or part with the possession of the whole or any portion of the said premises, without first having the written consent of the Lessor;

But the foregoing lease is upon the condition that if the Lessee shall fail to pay the rent reserved at the times and at the place provided or if it shall make breach of any term, covenant or condition herein contained, then the Lessor may re-enter the premises for condition broken and have the same as in its former estate, discharged of this lease; and it is understood and agreed by and between the parties that the receipt by the Lessor of any instalment of rent shall not be construed to be a waiver of any breach of any term, covenant or condition herein contained, except the breach of the covenant to pay the rent so received by [374] the Lessor and that no waiver of any kind shall be

construed to have occurred unless such waiver shall be in writing, signed by the Lessor.

IN WITNESS WHEREOF the parties hereto have hereunto set their names by their respective officers to this and to another instrument of like date and tenor, both of which shall be considered original, upon the day and year first above written.

THE FIRST BANK OF HILO, LTD.

By H. V. PATTEN, (Seal)

Its Cashier.

HOFFSCHLAEGER CO., LTD.

By ROBT. F. LANGE, (Seal)

Pres. & Gen. Mgr.

By \_\_\_\_\_.

Witnessed by JAS. M. MacCONEL.

Territory of Hawaii,

County of Hawaii,—ss.

On this 21st day of October, A. D. 1918, before me appeared H. V. Patten, to me personally known, who, being by me duly sworn, did say that he is the Cashier of the First Bank of Hilo, Ltd., and that the seal affixed to said instrument is the corporate seal of said corporation and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and said H. V. Patten acknowledged said instrument to be the free act and deed of said corporation.

[Seal]

JOHN ARRUDA,

Notary Public, Fourth Circuit, Territory of Hawaii. [375]

[Endorsed]: Plff's. Ex. "A." Lease. First Bank of Hilo, Ltd. to Hoffschlaeger Co., Ltd.

Dated: October, 1918. Supreme Court, Territory of Hawaii, Honolulu. No. 1360. Received and Filed in the Supreme Court December 17, 1921, at 9:50 o'clock A. M. J. A. Thompson, Clerk. [376]

No. 1360. In the Supreme Court of the Territory of Hawaii. Margaret Fraga, by Alfred Fraga, Her Guardian *ad Litem*, Plaintiff-Defendant in Error, vs. Hoffschlaeger Company, Limited, Defendant-Plaintiff in Error. Order for Transmission of Original Exhibit. Filed March 13, 1923. at 2:10 P. M. J. A. Thompson, Clerk. Smith, Warren, Stanley & Vitousek, Attorneys at Law, 404 Bank of Hawaii Building, Honolulu, T. H. Attorneys for Defendant-Plaintiff in Error. [377]

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In the Supreme Court of the Territory of Hawaii.  
No. 1360.

ON ERROR SUED OUT BY THE DEFEND-  
ANT.

MARGARET FRAGA, by ALFRED FRAGA,  
Her Guardian Ad Litem,  
Plaintiff-Defendant in Error,  
vs.

HOFFSCHLAEGER COMPANY, LIMITED,  
Defendant-Plaintiff in Error.

**Order for Transmission of Original Exhibit.**

To James A. Thompson, Esq., Clerk of the Supreme  
Court of the Territory of Hawaii:

You are hereby authorized and directed, in con-

nection with the writ of error from the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to transmit as part of the record required by the praecipe of the plaintiff in error the following exhibit, upon its counsel undertaking to return the same to the files of this Court, namely:

1. Plaintiff's Exhibit "N," X-ray Photographic Plates Nos. 1016 and 1017.

Dated: Honolulu, T. H., March 13, 1923.

[Seal] (Sgd.) E. C. PETERS,

Chief Justice of the Supreme Court of the Territory of Hawaii.

Rec'd copy of the foregoing this 13th day of March, 1923.

(Sgd.) F. PATTERSON,  
Attorney for Plaintiff. [378]

No. 1360. In the Supreme Court of the Territory of Hawaii. Margaret Fraga, by Alfred Fraga, Her Guardian *ad Litem*, Plaintiff-Defendant in Error, vs. Hoffschlaeger Company, Limited, Defendant-Plaintiff in Error. Undertaking to Return Original Exhibit. Filed March 13, 1923, at 2:10 P. M. J. A. Thompson, Clerk. Smith, Warren, Stanley & Vitousek, Attorneys at Law, 404 Bank of Hawaii Building, Honolulu, T. H., Attorneys for Defendant-Plaintiff in Error. [379]

In the Supreme Court of the Territory of Hawaii.

No. 1360.

ON ERROR SUED OUT BY THE DEFEND-  
ANT.

MARGARET FRAGA, by ALFRED FRAGA,  
Her Guardian Ad Litem,  
Plaintiff-Defendant in Error,  
vs.

HOFFSCHLAEGER COMPANY, LIMITED,  
Defendant-Plaintiff in Error.

**Undertaking to Return Original Exhibit.**

To James A. Thompson, Esq., Clerk of the Supreme  
Court of the Territory of Hawaii:

We hereby undertake to return to the files of  
the Supreme Court of the Territory of Hawaii  
the following original Exhibit sent to the United  
States Circuit Court of Appeals for the Ninth Cir-  
cuit, in accordance with the Order of the Chief  
Justice of the Supreme Court of the Territory of  
Hawaii:

1. Plaintiff's Exhibit "N," X-ray Photographic  
Plates Nos. 1016 and 1017.

Dated: Honolulu, T. H., March 13, 1923.

SMITH, WARREN, STANLEY & VITOUSEK.

Received copy of within undertaking this 13th  
day of March, 1923.

(Sgd.) F. PATTERSON,  
Attorney for Plaintiff-Defendant in Error. [380]



In the Snpreme Court of the Territory of Hawaii.  
No. 1360.

**ERROR TO CIRCUIT COURT, FOURTH CIR-  
CUIT.**

**MARGARET FRAGA**, by **ALFRED FRAGA**,  
Her Guardian Ad Litem,  
Plaintiff-Defendant in Error,  
vs. . . . .

**HOFFSCHLAEGER COMPANY, LIMITED**,  
Defendant-Plaintiff in Error.

**Certificate of Clerk of Supreme Court to Transcript  
of Record and Return to Writ of Error.**

Territory of Hawaii,  
City and County of Honolulu,—ss.

I, James A. Thompson, Clerk of the Supreme Court of the Territory of Hawaii, in obedience to the within writ of error, the original whereof is herewith returned, being pages 350 to 352, both inclusive, of the foregoing transcript, and in pursuance to the praecipe to me directed, a copy whereof is hereto attached, being pages 360 to 364, both inclusive, DO HEREBY TRANSMIT to the Honorable United States Circuit Court of Appeals for the Ninth Circuit the foregoing transcript of record, being pages 1 to 336, both inclusive, pages 355 to 357, both inclusive, pages 368 to 370, both inclusive, pages 373 to 376, both inclusive, and pages 379 to 380, both inclusive, AND I CERTIFY the same to be full, true and correct copies of the

pleadings, record, entries, exhibits and final judgment which are now on file and of record in the office of the Clerk of the Supreme Court of the Territory of Hawaii, in the cause entitled in said Court, "Margaret Fraga, by Alfred Fraga, Her Guardian *ad Litem*, Plaintiff-Defendant in Error, versus Hoffschlaeger Company, Limited, Defendant-Plaintiff in Error," Numbered 1360. [381]

I DO FURTHER CERTIFY that the original assignment of errors, being pages 337 to 349, both inclusive; the original citation on writ of error, with service thereof, being pages 353 to 354, both inclusive; the original order filed December 19, 1922, extending time until February 20, 1923, for the preparation and transmission of record, being pages 358 to 359, both inclusive, and the original order filed February 9, 1923, extending time until April 5, 1923, for the preparation and transmission of record, being pages 371 to 372, both inclusive, of the foregoing transcript of record are herewith returned.

I FURTHER CERTIFY that pursuant to orders herein filed, copies whereof are hereto attached, being pages 365 to 367, both inclusive, and pages 377 to 378, both inclusive, I do transmit herewith as part of the record in the foregoing entitled cause, the original exhibits, viz:

- (1) Plaintiff's Exhibit "B," X-ray Photographic Plate.
- (2) Plaintiff's Exhibit "C," Photographic Print of X-ray Plate Ex. "B."

- (3) Plaintiff's Exhibit "D," X-ray Photographic Plate.
- (4) Plaintiff's Exhibit "E," X-ray Photographic Plate.
- (5) Plaintiff's Exhibit "F," Photographic Print of X-ray Plate, Ex. "D."
- (6) Plaintiff's Exhibit "G," Photographic Print of X-ray Plate, Ex. "E."
- (7) Plaintiff's Exhibit "H," Photograph of Iron Grating.
- (8) Plaintiff's Exhibit "I," Photographic Print of X-ray No. 1014.
- (9) Plaintiff's Exhibit "J," Photographic Print of X-ray No. 1015.
- (10) Plaintiff's Exhibit "K," X-ray Photographic Plates No. 1014 and No. 1015.
- (11) Plaintiff's Exhibit "L," Photographic Print of X-ray Plate No. 1016.
- (12) Plaintiff's Exhibit "M," Photographic Print of X-ray Plate No. 1017, and
- (13) Plaintiff's Exhibit "N," X-ray Photographic Plates No. 1016 and No. 1017. [382]

I LASTLY CERTIFY that the cost of the foregoing transcript of record is \$274.35, and that said amount has been paid by Messrs. Smith, Warren, Stanley & Vitousek, the attorneys for the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the Supreme Court of the Territory of Hawaii, at Honolulu,

City and County of Honolulu, this 15th day of March, A. D. 1923.

[Seal]                      JAMES A. THOMPSON,  
Clerk of the Supreme Court of the Territory of  
Hawaii. [383]

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[Endorsed]: No. 3997. United States Circuit Court of Appeals for the Ninth Circuit. Hoffschlaeger Company, Limited, Plaintiff in Error, vs. Margaret Fraga, by Alfred Fraga, Her Guardian *ad Litem*, Defendant in Error. Transcript of Record. Upon Writ of Error to the Supreme Court of the Territory of Hawaii.

Filed March 28, 1923.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk. *31*

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